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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

[IN THE COURT OF APPEAL.]

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1919

Jan. 17, 20, 29, 30; *Feb.* 24.

PORT OF LONDON AUTHORITY *v.* ASSESSMENT COMMITTEE OF ORSETT UNION AND OTHERS.

Rating—Docks—Statutory Authority—Incapacity to earn Profit—Annual Value—Hypothetical Tenant—Tenant's Profit—Parochial Assessments Act, 1836 (6 *&* 7 *Will.* 4, *c.* 96), *s.* 1—*Port of London Act,* 1908 (8 *Edw.* 7, *c.* 68), *s.* 21.

Before the passing of the Port of London Act, 1908, a dock company owned certain docks and carried on the business thereof as a commercial undertaking for their own profit. By that Act the Port of London Authority was constituted, the docks were transferred to the authority, and the authority was directed to carry on the business not with a view to profit, but for the benefit of the Port of London, the Act containing a provision that of the receipts of the authority on revenue account the balance, if any, after making several payments by the Act prescribed, should be applicable to such purposes and in such manner for the benefit of the port as the authority might determine.

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The authority was rated to the relief of the poor as occupiers of the docks, the gross and rateable values respectively thereof being based on the receipts and expenses of the authority in relation thereto. On an appeal to Quarter Sessions the authority claimed that in arriving at the rateable value an allowance should be made for the profits of the hypothetical tenant. The Court of Quarter Sessions made no allowance for tenant's profits, but stated a case upon the question whether they were right in holding themselves precluded by law from making any allowance for such profits:—

Held, that the question could not be answered as a matter of law; that the assessment committee must take into account the character or class of the hereditament to be valued with all its advantages and all its fetters and disabilities and that a statutory restriction against applying any part of a statutory revenue to profit was a fetter or disability to be taken into account; that a hypothetical tenant must be found for this class of property from among the class of persons to which the statutory owner belongs; and that as no one contemplating a profit out of his occupation would be an applicant for this class of property, it could not be said as matter of law that tenant's profits must be deducted from the estimated income in order to arrive at the rateable value; but that it was open to the assessment committee, in forming a conclusion as to what such a hypothetical tenant would pay as rent for the hereditament, to consider what rent a tenant unfettered by statutory restrictions might be expected to give for it if he could use it to make a tenant's profit.

Mersey Docks v. *Liverpool Overseers* (1873) L. R. 9 Q. B. 84 discussed.

APPEAL from the decision of a Divisional Court (see [1919] 1 K. B. 88, note 1).

The Port of London Authority having appealed to the Court of Quarter Sessions for the County of Essex holden at Chelmsford against a rate made on October 27, 1916, for the relief of the poor of the parish of Chadwell St. Mary, the Court allowed the appeal and amended the rate subject to the opinion of the King's Bench Division upon the following case :—

1. The Port of London Authority (hereinafter called the Port Authority) are a body corporate established by the Port of London Act, 1908 (8 Edw. 7, c. 68), for the purpose of administering, preserving, and improving the Port of London, and otherwise for the purposes of the said Act, which may be referred to and is to be deemed to form part of this case.

2. By s. 3 of the Port of London Act, 1908, the undertakings of the London and India Docks Co., the Surrey Commercial

Dock Co., and the Milwall Dock Co. were transferred to and vested in the Port Authority, in consideration of the issue to those companies respectively of the several amounts of port stock created under the Act, which are specified in the said section; and subject to the provisions of the Act, and of any Order of the Board of Trade made under the said section, on the transfer of any such undertaking the Port Authority are to hold the undertaking and may exercise all the rights, powers, and privileges of the company and shall, to the exclusion of the company, be subject to all the duties, obligations, and liabilities of the company (other than those in respect of the debenture stock of the company) under the Acts, whether local or general, and other provisions relating to or affecting the company and to all other duties, liabilities, and obligations of the company as if they were the company.

3. By s. 7 of the Act there were transferred to the Port Authority certain powers, rights, and duties of the Conservators of the River Thames, more particularly described in the said section.

4. By s. 11 of the Act there were transferred to the Port Authority certain powers and duties of the Watermen's Co. more particularly described in the said section.

5. By s. 13 of the Act certain port rates on all goods imported from parts beyond the seas or coastwise into the Port of London or exported to parts beyond the seas or coastwise from that port, might be imposed by the Port Authority, subject to the provisions of the said section.

6. By s. 14 of the Act it is enacted as follows:—

"The provisions contained in the enactments relating to the London and India Docks Co. conferring on that company power to demand and take rates, rents and sums in respect of vessels entering, lying in, or departing from the docks, basins, cuts, or entrances of that company, or granting any exemptions or immunities from any such rates, rents or sums, shall continue to apply in respect of vessels entering, lying in, departing from, or otherwise using the docks, basins, cuts or entrances and shall also apply in respect of vessels

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entering, lying in, departing from or otherwise using docks, basins, cuts or entrances constructed by the Port Authority under this Act or transferred from any other dock company to the Port Authority by this Act and shall as respects docks, basins, cuts or entrances so transferred be substituted for the provisions as to rates and other charges on vessels contained in the enactments relating to the companies whose undertakings have been so transferred."

7. By s. 16 of the Act there is to be established a port fund, and all receipts of the Port Authority are to be carried to that fund and all payments by the Port Authority are to be made out of that fund.

8. By s. 21 of the Port of London Act, 1908, it is enacted as follows :—

"The receipts of the Port Authority on revenue account in any year shall be applied to the following purposes in the following order :

"(1.) The payment of working and establishment expenses and the cost of the maintenance of the port, and of the execution and performance of the powers and duties of the Port Authority (including amongst other things payments on account of pensions, superannuation allowances, and compensation payable to officers and servants) properly chargeable to revenue account ;

"(2.) The payment of interest on 'A' port stock and any arrears thereof ;

"(3.) The payment of interest on other classes of port stock and any arrears thereof ;

"(4.) The payment of interest on any loan raised by the Port Authority otherwise than by the issue of port stock ;

"(5.) The payment of any sums required under this Act to be paid into any sinking or redemption fund, or otherwise towards the discharge of any capital liability ;

"(6.) The payment into the reserve fund created under this Act of any sums required by this Act to be paid into that fund ;

and the balance, if any, shall be applicable to such purposes

and in such manner for the benefit of the port as the Port Authority may determine."

9. By s. 22 of the Act the Port Authority are directed to create a reserve fund of such an amount and for such purposes as are specified in the said section, and by s. 23 if the Board of Trade are satisfied that the receipts of the Port Authority on revenue account in any year are likely to be insufficient to meet the charges payable out of revenue in that year, or that the receipts of the Port Authority on revenue account in the last preceding year were insufficient to meet the charges payable out of revenue in that year, the board may make an order requiring the Port Authority to levy any additional or increase any existing dues which they are authorized to levy, to such extent and for such period as the board may specify in the order, and the Port Authority shall comply with the order so made, so however that neither the additional nor the increased dues shall exceed the maxima allowed by law.

10. In the poor rate made on October 27, 1916, for the parish of Chadwell St. Mary (which rate was the subject of this appeal) the Port Authority were rated as the occupiers of certain hereditaments forming part of the Tilbury Docks and their appurtenances at the sum of 119,240*l.* as the gross estimated rental and the sum of 64,440*l.* as the rateable value; and the Port Authority contended (inter alia) that they were over-rated both as to the gross estimated rental and the rateable value of the said hereditaments. In the course of the hearing of said appeal it was agreed between the parties thereto that the sum to be deducted from the gross estimated rental of the said hereditaments for the probable average annual cost of repairs, insurances, and other expenses (if any) necessary to maintain the said hereditaments in a state to command the rent (pursuant to s. 1 of the Parochial Assessments Act, 1836) was to be taken at 54,800*l.*, being the amount allowed in the said rate. In the valuation list in force before the making of the rate under appeal the Port Authority were assessed in respect of the said hereditaments at 85,000*l.* as the gross estimated rental and 38,200*l.* as the rateable value.

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11. The Tilbury Docks (of which the hereditaments the subject of the appeal formed part) were part of the undertaking of the London and India Docks Co. which was transferred to and vested in the Port Authority under s. 3 of the Port of London Act, 1908, set out above.

12. In consequence of the war the port of Southampton was appropriated exclusively to the ships belonging to, or in the service of His Majesty's Navy, and was closed to ordinary merchant shipping; in consequence, many ships conveying merchandize were diverted from Southampton to the Port of London. By reason mainly of this the tonnage of ships entering the Tilbury Docks in the financial year ending March 31, 1916, did in fact rise in excess of the ships' tonnage entering the said docks before the war.

13. In consequence of the general rise in wages and other expenditure owing to war conditions the Port Authority had substantially increased the dues charged on vessels entering their docks under s. 14 of the Port of London Act, 1908, the additional charges being increased as from the following dates, namely, the dues previously payable were increased as from March 8, 1915, by 7½ per cent. and as from July 24, 1916, by 15 per cent. instead of 7½ per cent.; and subsequently by an order made by the Board of Trade dated April 23, 1917, made under regulation 39 BB of the Defence of the Realm (Consolidation) Regulations, 1914, the Port Authority were authorized to make a further increase of the said dues not exceeding by more than 15 per cent. the dues in operation at the date of the said order. The additional amounts falling to be paid by reason of the rise in wages and other expenditure as aforesaid were taken in account in arriving at the amount of 54,800*l.* agreed to be deducted as aforesaid and also in arriving at the expenses in the next succeeding paragraph of this case referred to.

14. Both parties to the appeal agreed that the gross estimated rental and rateable value of the said hereditaments were to be arrived at by some process of calculation based on the receipts and expenses of the Port Authority in respect of the said hereditaments, either for one or more years. The

Port Authority put forward calculations based on the accounts for the two financial years ending respectively on March 31, 1914 (being the last year before the commencement of the war), and March 31, 1916 (being the last year before the making of the rate appealed against). The Assessment Committee put forward calculations based on the accounts for the financial year ending March 31, 1916. The Port Authority's printed accounts for the three years ending on March 31, 1914, 1915, and 1916 respectively were put before the Quarter Sessions and may be referred to as part of this case.

15. The calculations put forward by the Port Authority and the Assessment Committee respectively differed from one another on several points of which two only (which were by far the more important) need be referred to for the purposes of this case.

16. The Port Authority claimed that in arriving at the rateable value of the said hereditaments by any process of calculation based on their receipts in respect thereof deductions should be made in respect of (*a*) the liability, or alleged liability, of the Port Authority to pay Excess Profits duty and (*b*) an allowance for the profits of the hypothetical tenant of the said hereditaments. The Assessment Committee disputed the right to make either of the said two deductions.

17. [This paragraph related solely to Excess Profits duty and is not material to this report.]

18. The Port Authority contended before the Quarter Sessions. . . . .

(2.) That in estimating the rent which any hypothetical tenant of the Tilbury Docks might reasonably be expected to pay for the said docks an allowance must be made out of the receipts therefrom for such hypothetical tenant's profit which he must be assumed to receive for himself, as an inducement to give the hypothetical tenant's rent, which under s. 1 of the Parochial Assessments Act, 1836, was made the measure of rateable value ; and that any decision contrary to this contention was wrong in law.

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19. The Assessment Committee contended:

(*a*) That no deduction for Excess Profits duty should be made from the Port Authority's receipts in respect of the Tilbury Docks. . . . .

(*b*) That the decision of the Queen's Bench in *Mersey Docks* v. *Liverpool* (1) was an express decision that in rating a public authority which was prohibited by statute from making a profit no deduction should be made on account of tenant's profits; and that that decision was binding on the Quarter Sessions and was right in law.

20. The Quarter Sessions in giving judgment on the appeal fixed the gross estimated rental of the Port Authority's undertaking in the parish of Chadwell St. Mary at 106,863*l.* and the rateable value thereof at 52,063*l.*; and stated that in arriving at this decision the Court had acted upon the decision in *Mersey Docks* v. *Liverpool Overseers* (1), and it had in consequence made no allowance for tenant's profits beyond allowing interest on the capital employed; and that the Court had further accepted the contention that a hypothetical tenant would take into consideration the liability to Excess Profits duty. The appeal to Quarter Sessions was accordingly allowed subject to the opinion of the High Court upon this case, but inasmuch as each party had succeeded in part on the appeal no order was made as to costs. A transcript of the shorthand notes of the judgment as delivered by the chairman of the Court and some discussion which followed thereon is annexed to and forms part of this case.

The questions for the opinion of the Court are:

(1.) Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenant's profits; and

(2.) Whether they were right and not acting contrary to law in taking into account Excess Profits duty in arriving at the rateable value of the hereditament rated.

If the Court answers each of the questions in the affirmative the decision of the Quarter Sessions is to stand, otherwise the case is to be remitted to that Court to determine the gross

(1) L. R. 9 Q. B. 84.

and the rateable values respectively in the light of and in accordance with the decision of the Court.

The Divisional Court (Darling, Lord Coleridge and Avory JJ.), in answer to the second question, held (1) that the Court of Quarter Sessions were right in taking into account Excess Profits duty. Upon this point there was no appeal. As to the first question, the Port of London Authority formally took the point that an allowance must be made in respect of tenant's profit; but the point was not argued, the Divisional Court being bound by *Mersey Docks* v. *Liverpool Overseers* (2) to hold that no allowance could be made on this account. Upon this point the Port of London Authority appealed.

Talbot K.C., *Ryde K.C.*, and *Konstam* for the appellants. The decision in *Mersey Docks* v. *Liverpool Overseers* (2) is wrong and ought to be overruled, and an allowance ought to be made in this case for tenant's profits. The principle on which hereditaments are to be valued for the purpose of rating the occupier was settled by a number of decisions ultimately embodied in the Parochial Assessments Act, 1836. "The nature of the occupier's interest must be disregarded, and the rate imposed according to some value of the subject of occupation. Usage and convenience have established this value to be not that of the estate or property itself, but that of the profit which is or might be made from the estate or property," per Parke J., *Rex* v. *Adames*. (3) Where the rates or tolls of a canal company amounted to 1200*l*. a year, but could not be leased to a grantee at more than 1000*l*. a year owing to the expense of collection, it was held that the company must be assessed as on a rateable value of 1000*l*.: *Rex* v. *Oxford Canal Co.* (4) On the other hand, where a dock company were empowered to take only such dues as would enable them to maintain the dock, it was held that they were not rateable in respect of the premises or the dues: *Rex* v. *Liverpool Inhabitants*. (5) These were the principles embodied in the Parochial Assessments Act, 1836, which enacts that no

(1) [1919] 1 K. B. 84.
(2) L. R. 9 Q. B. 84.
(3) (1832) 4 B. & Ad. 61, 67.
(4) (1825) 4 B. & C. 74.
(5) (1827) 7 B. & C. 61.

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rate shall be valid unless made "upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same might reasonably be expected to let from year to year, free of all usual tenants' rates and taxes, and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance, and other expenses, if any, necessary to maintain them in a state to command such rent." The object of that enactment was to establish one uniform mode of rating throughout the country. One method of arriving at the rent which the hypothetical tenant will give for the hereditament is by considering his probable receipts and expenses; but where the hereditament is ordinarily used for commercial purposes, some allowance must be made for the profit which he may reasonably expect to make from his occupation, because he will not give such a rent as would prevent him from making a profit on his undertaking. While the Tilbury Docks were vested in the London and India Docks Co. that company was properly rated on this method of receipts and expenses as the occupier of a hereditament used for commercial purposes and capable of yielding a profit to the occupier, and in estimating the rateable value of the hereditament an allowance was properly made for the tenant's profit. Why should a different mode of rating be adopted when the docks became vested in the appellants? The effect would be to make the rateable value of the same hereditament vary according as it is occupied by a public authority or by a private trading tenant. This hereditament has not changed in value with its change of ownership. It produces the same profit whoever owns it. That profit, instead of going to the shareholders of the company, goes in part to the holders of port stock. It is true that any surplus revenue after paying interest on the port stock cannot go to enrich the members of the corporation; but that does not affect the rateable value of the hereditament. In *Jones* v. *Mersey Docks* (1) Lord Cranworth said: "I can discover nothing either in the words or in the spirit of the Act"—i.e. 43 Eliz., c. 2—

(1) (1865) 11 H. L. C. 443, 507.

"exempting from liability the occupier of valuable property, merely because the profits of the occupation are not to be enjoyed by him or by any on whose behoof he is occupying, but are to be devoted to the benefit of the public." The opinion of Lord Chelmsford (1) is to the same effect. But the profit does go to enrich the corporation itself in the sense that their hereditament gains in value as often as they apply the balance of revenue for the benefit of the Port of London under s. 21 of the Port of London Act, 1908. The fact that the owners are also the occupiers of the hereditament makes no difference, and the fact that they cannot be tenants to themselves is equally immaterial: *London County Council* v. *Churchwardens &c. of Erith* (2), disapproving of *Owens College* v. *Chorlton-upon-Medlock Overseers.* (3)

The only question is what rent, calculated as prescribed by the Act of 1836, the hypothetical tenant will give for the hereditament. It is immaterial to what purposes that rent is applied: *Jones* v. *Mersey Docks.* (4) The rent which a public authority will offer must be just sufficiently high to outbid the trading tenant; it would not be justified in paying more. The rent which a trading tenant will give, and that which a public authority will give, may both be considered in arriving at the hypothetical tenant's rent. If so, it cannot be said as a matter of law that no allowance must be made for tenant's profits. In *Mersey Docks* v. *Liverpool Overseers* (5) Blackburn J. compared the occupiers of a hereditament, whose revenue was appropriated by statute, to the owner of a rent-charge, in which case, as he said, no allowance would be made for tenant's profit. But, first, the analogy is a misleading one, because the rent-charge is fixed in amount while the appellants' revenue varies with the success of their undertaking; and secondly, an allowance may be made for tenant's profits even when rating the holder of a rent-charge: *Dean and Chapter of St. Asaph* v. *Llanrhaiadr-yn-Mochnant Overseers.* (6)

(1) (1865) 11 H. L. C. 519 et seq.
(2) [1893] A. C. 562.
(3) (1887) 18 Q. B. D. 403.
(4) 11 H. L. C. 443, 463, 478.
(5) L. R. 9 Q. B. 84.
(6) [1897] 1 Q. B. 511.

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Colefax K.C. and *Jeeves* for the respondents. *Mersey Docks* v. *Liverpool Overseers* (1) has stood without question for more than forty-five years, and is law. It is not to be supposed that the Assessment Committee or the Court of Quarter Sessions have overlooked the nature of the hereditament they were valuing and have ignored the terms upon which alone it can be occupied. This hereditament is struck with incapacity to yield a tenant's profit, that is to say, the profit which a commercial tenant would expect to earn for the risk undertaken. The element of tenant's profit forms no part of the balance of receipts over expenses. Consequently that element must not be deducted from the receipts ; if it were, the rateable value of the hereditament would be reduced unreasonably. *Rex* v. *Adames* (2) and *Rex* v. *Oxford Canal Co.* (3) dealt with the rating of ordinary commercial occupiers free from statutory restriction as to profits, and have no application to the present case. The passage relied on from *Jones* v. *Mersey Docks* (4) relates to the rateability of the occupier, not to the amount of his assessment. The application of revenue is immaterial in considering whether the occupier is rateable ; it does not follow that it is immaterial when the amount of his assessment is in question.

The hypothetical tenant must be one who takes the hereditament subject to the same restrictions as are imposed and entitled to the same advantages as are conferred upon the statutory occupier: *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union.* (5) As Lord Halsbury said in *Hull Docks Co.* v. *Sculcoates Union* (6), after quoting the words of Lord Herschell L.C. in *London County Council* v. *Erith Churchwardens* (7), "The Legislature has prohibited letting these railways and trams for profit ; and though this does not shield the dock from rateability, it does not justify taking into account as one source of profit that which the Legislature has said shall not be a source of profit." This language was approved on appeal in the House of Lords. (8)

(1) L. R. 9 Q. B. 84.
(2) 4 B. & Ad. 16.
(3) 4 B. & C. 74.
(4) 11 H. L. C. 507.
(5) (1886) 17 Q. B. D. 384.
(6) [1894] 2 Q. B. 69, 81.
(7) [1893] A. C. 592.
(8) [1895] A. C. 136, 148, 150.

The appellants themselves must be regarded as possible tenants: *London County Council* v. *Erith Churchwardens* (1), overruling *Owens College* v. *Chorlton-upon-Medlock Overseers* (2), and the only possible tenants of this hereditament: *Reg.* v. *School Board for London* (3); because, being by statute precluded from earning tenant's profits, no one looking for a profit would become a tenant of the hereditament.

Mersey Docks v. *Liverpool Overseers* (4) has been followed in Scotland in *Dundee Gas Commissioners* (5), *Kirkwall Harbour Trustees* (6), and *Ayr Harbour Trustees* v. *Assessor for Ayr* (7), and has been treated as deciding a question of law and not of fact; and where, as in this case, all the facts have been found, the answer to the question must be matter of law. The Court of Quarter Sessions were therefore right in holding themselves precluded by law from making any allowance for tenant's profits, and the question asked in the special case should be answered in the affirmative.

Ryde K.C. in reply.

Cur. adv. vult.

Feb. 24. The following written judgments were delivered:—

BANKES L.J. This is an appeal from a decision of a Divisional Court upon a special case stated by Quarter Sessions. The special case submitted two questions for the consideration of the Court. It is with the first of these two questions only that we are concerned. The Divisional Court considered itself bound by the decision in the case of *Mersey Docks* v. *Liverpool Overseers* (4), and merely answered this question in accordance with that decision. The object of the present appeal is, if possible, to get that decision overruled. The question in issue between the parties is as to the proper rateable value of a portion of the Tilbury Docks which were formerly part of the undertaking of the London and India Docks Co. That undertaking was, together with the undertakings of the other London dock companies, transferred by the Port of London

(1) [1893] A. C. 562.
(2) 18 Q. B. D. 403.
(3) (1886) 17 Q. B. D. 738.
(4) L. R. 9 Q. B. 84.
(5) (1881) 9 R. 1240.
(6) (1881) 9 R. 1243.
(7) (1894) 21 R. 807.

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Act, 1908, to the Port of London Authority, a statutory body created by that Act for the purpose of taking over, and carrying on as one undertaking, all the docks in the Port of London. It is not necessary to refer to the provisions of the Port of London Act in any great detail. It is sufficient to say that the Act fixed the amounts which the Port Authority were entitled to charge for the use of the docks and for the accommodation provided by the Authority. It provided for a possible increase in those charges in certain events. It directed that all receipts were to be carried to a port fund, and that all receipts on revenue account in any year were to be applied as directed by s. 21 of the Act. That section provides that: "The receipts of the Port Authority on revenue account in any year shall be applied to the following purposes in the following order:

> (1.) The payment of working and establishment expenses and the cost of the maintenance of the port, and of the execution and performance of the powers and duties of the Port Authority (including amongst other things payments on account of pensions, superannuation allowances, and compensation payable to officers and servants) properly chargeable to revenue account; (2.) the payment of interest on A port stock and any arrears thereof; (3.) the payment of interest on other classes of port stock and any arrears thereof; (4.) the payment of interest on any loan raised by the Port Authority otherwise than by the issue of port stock; (5.) the payment of any sums required under this Act to be paid into any sinking or redemption fund, or otherwise towards the discharge of any capital liability; (6.) the payment into the reserve fund created under this Act of any sums required by this Act to be paid into that fund;

and the balance, if any, shall be applicable to such purposes and in such manner, for the benefit of the port, as the Port Authority may determine. . . . ."

It is material to notice that under the provisions of this section no portion of the revenue of the undertaking can ever be available for "tenant's profits," using that expression

in the sense of what a tenant would expect to be able to put into his own pocket, after meeting all necessary outlay, as a result of his carrying on any particular business or undertaking.

The precise dispute between the parties is to be found in paragraphs 16, 18 (2.) and 19 (*b*) of the special case. In paragraph 16 it is stated that "The Port Authority claimed that, in arriving at the rateable value of the said hereditaments by any process of calculation based on their receipts in respect thereof, deduction should be made in respect of (*b*) an allowance for the profits of the hypothetical tenant of the said hereditaments. The Assessment Committee disputed the right to make either of the said two deductions." In paragraph 18 (2.) the contention of the Port Authority is stated thus: "That in estimating the rent which any hypothetical tenant of the said Tilbury Docks might reasonably be expected to pay for the said docks an allowance must be made out of the receipts therefrom for such hypothetical tenant's profit which he must be assumed to receive for himself, as an inducement to give the hypothetical tenant's rent, which under the Parochial Assessments Act, 1836, s. 1 was made the measure of rateable value; and that any decision contrary to this contention was wrong in law." In paragraph 19 (*b*) the contention of the Assessment Committee is stated thus: "That the decision of the Queen's Bench in *Mersey Docks* v. *Liverpool Overseers* (1) was an express decision that in rating a public authority which was prohibited by statute from making a profit no deduction should be made on account of tenant's profits; and that that decision was binding on the Quarter Sessions and was right in law." The question for the opinion of the Court is stated thus: "Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenant's profits." That is the question which this Court is asked to decide.

The case has been fully and ably argued on both sides. The arguments may be summarized thus. For the appellants it was contended that the object of the Parochial Assessments Act, 1836, was to secure equality and uniformity of rating;

(1) L. R. 9 Q. B. 84.

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that it would be not only contrary to the spirit of the Act, but a manifest absurdity, to hold that the docks in question had a higher rateable value in the hands of the Port Authority than they had in the hands of the previous owners, the London and India Docks Co., having regard to the fact that the revenue-earning capacity of the docks in the hands of the Port Authority was the same as it had been in the hands of the London and India Docks Co.; that for the purpose of considering what rent the hypothetical tenant from year to year of any hereditament would give for the hereditament it was neither material nor permissible to consider how he might or would apply any revenue derived from the occupation of the hereditament; and that in considering what a hypothetical tenant from year to year would give for the particular hereditament, the assessment of which is the subject-matter of this appeal, it is permissible to include the commercial tenant, who expects to make a tenant's profit out of his occupation, as a possible applicant for the tenancy.

For the respondents it was contended that the case was covered by the decision in *Mersey Docks* v. *Liverpool Overseers* (1), which case was not only good law but good sense, and that it was not possible in considering what a hypothetical tenant would give for the hereditament in question to exclude from consideration the fact that under no circumstances could the occupation of the hereditament produce any tenant's profits to anyone whosoever he might be.

The present case appears to me to be one to which the instructive warning given by Lord Halsbury L.C. in his speech in the case of *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (2) has a peculiar value. He points out what hesitation and confusion have been introduced into rating questions by treating or endeavouring to treat what ought to be dealt with as matters of fact as matters of law. In arriving at what the hypothetical tenant might be expected to give for business premises in which he may lawfully carry on a

(1) L. R. 9 Q. B. 84. (2) [1901] A. C. 175.

business, from which he may reasonably expect to derive a tenant's profit, it is no doubt legitimate to deduct the amount of the tenant's profit from the anticipated gross returns. To say that as a matter of law the same process must or must not, as the case may be, be followed in every case where the net annual value of the hereditament is to be ascertained by a consideration of receipts and expenses, is to my mind an impossibility. Yet that is what both parties appear to me to be asking in the present appeal. The appellants are contending that the Assessment Committee are as a matter of law bound to deduct a full tenant's profit from the dock receipts before arriving at the rateable value. The respondents, on the other hand, are contending that the Assessment Committee are not as a matter of law allowed to take into consideration at all any question of tenant's profit. In my opinion both contentions are wrong. The case of *Mersey Docks* v. *Liverpool Overseers* (1) has been much discussed in the argument addressed to us, and its authority has been challenged. It is necessary to see exactly what that case decided. The appellants in that case were the Mersey Docks and Harbour Board, who for the present purposes were in the same position as the Port of London Authority now is. Neither body could apply any portion of its revenue to a tenant's profit. In paragraph 19 of the special case stated for the opinion of the Court in the *Mersey Docks* v. *Liverpool Overseers* (1) the contention of the appellants was "That they are entitled to deduct tenants' profits, as would be done in any case of a trading body." The first question for the opinion of the Court was "Whether, under such a state of facts, the Mersey Dock Board are entitled to the deduction of tenants' profits." The decision of the Court was that they were not. In my opinion that decision was perfectly right treating it, as I consider it ought to be treated, as a decision that as a matter of law the Mersey Docks Board were not entitled to the deduction. It does not at all necessarily follow from that decision that the question of tenant's profits must be entirely

(1) L. R. 9 Q. B. 84.

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excluded from consideration in a case like the present. In dealing with what Lord Halsbury calls in the speech to which I have already referred the "simple question of fact" and in making the necessary estimate of what the net annual value of any particular hereditament may be, it may possibly in some cases be considered as of some assistance to consider what a tenant's profit would be likely to be, not necessarily for the purpose of deducting the whole or any part of it from the gross receipts derived from the occupation of the hereditament, but as a guide in arriving at a conclusion as to what the hypothetical tenant from year to year would in the opinion of the person making the valuation be likely to give for the particular hereditament which has to be valued. The real question and the only question of law, as it appears to me, which has emerged from the arguments before this Court may be put in the form of this question: What for rating purposes is the character or class of the property which the Assessment Committee have to value? To some extent this question has been settled by agreement between the parties, because it appears in paragraph 14 of the special case that the hereditaments are to be treated as having a rateable value, and that the rateable value ought to be arrived at by some process of calculation based on the receipts and expenditure of the Port Authority in respect of the hereditaments either for one or more years. The parties are apparently also agreed that the hereditaments are to be treated as a statutory undertaking, whose power of deriving revenue from any occupation of the hereditaments is that fixed by the Port of London Act. So far therefore as concerns the receipts side of the account which has to be taken into consideration by the authority which fixes the rateable value, no question arises between the parties. It is with regard to the expenditure side that the dispute has arisen. Attention has been called in support of two branches of the appellants' argument to the case of *Jones* v. *Mersey Docks* (1) and to some passages from the opinion of Blackburn J. in that case. (2) At p. 479 he is pointing out that the revenue-earning capacity

(1) 11 H. L. C. 443. (2) Ibid. 463, 479.

of the hereditament was precisely the same after it was taken over by the Mersey Docks Board as it was before, and at p. 463 that it is immaterial to consider to what purpose the rent is applied. The question with which Blackburn J. was there dealing was a question whether the hereditaments were rateable at all, and his observations were directed to that question. I am quite prepared to admit that for certain purposes it is quite immaterial to consider the purposes to which a tenant applies the income derived from the occupation of a hereditament, but I cannot admit that the argument is sound when its object is to establish that the hereditament is for the purpose of estimating its net annual value something other than what it really is. This is where I part company from the argument for the appellants. It is in my opinion just as necessary for the purpose of assessing the net annual value of the statutory undertaking of the Port of London Authority to bear in mind that it is an undertaking incapable of producing a tenant's profit, as it is to bear in mind that it is an undertaking capable only of producing the statutory revenue. For rating purposes the property must be taken as it stands with all its advantages and all its fetters or disabilities. The statutory restriction against applying any portion of the statutory revenue to tenant's profits is in my opinion just as much a fetter on the property as is a restrictive covenant running with the land against using it for some particular profitable purpose. I think this view of the law is entirely in accordance with authority. In the case of the *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union* (1) Lord Esher M.R. states the law thus: "Where land is occupied by a local authority for public purposes the land is to be assessed to the poor rate at the rent which a tenant would pay, if subject to the same restrictions as are imposed, and entitled to the same advantages as are conferred, upon the local authority." I think that this is really the same view of the law as is expressed by Blackburn J. in the *Mersey Docks* v. *Liverpool Overseers* (2), though not in the same language. It is not necessary for the purpose

(1) 17 Q. B. D. 384, 387. (2) L. R. 9 Q. B. 84.

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of supporting the decision in that case to agree with the reasons which Blackburn J. gives for his judgment, and with great respect to that very learned judge I do not agree with the analogy he puts between the case he was dealing with and the case of a tithe rent-charge; but with the rest of his reasoning I do agree if its true meaning is to enforce the view that in estimating the net annual value of the hereditaments under consideration in that case it was impossible to ignore the fact that they were of a non-tenant's profit-bearing character.

The result of my view of the present case is this. The hereditaments which are to be assessed are a statutory undertaking capable of producing a certain statutory income, but incapable of producing a tenant's profit in the sense in which I have defined that expression in an earlier part of this judgment. That is the class of property for which the hypothetical tenant has to be found. No commercial tenant in the sense of a tenant who expects to be able to make his tenant's profit out of his occupation will be an applicant for this class of property. It cannot therefore be right as a matter of law to deduct tenant's profits from the estimated income to arrive at the rateable value. The net annual value must be estimated from the point of view that the hypothetical tenant must be found from among the class of persons to which the statutory owner belongs, that is to say persons, whether statutory bodies or not, who carry on undertakings of a public nature of the class of that carried on by the statutory owner. It may be that the statutory owner is the only possible hypothetical tenant, as was the case in *Reg.* v. *School Board for London* (1); and the case must then be considered from the point of view indicated by Lord Herschell L.C. in *London County Council* v. *Erith Churchwardens* (2), where he sums up the position in that case by saying: "In all cases of the description of which I am speaking, the whole of the circumstances and conditions under which the owner has become the occupier must be taken into consideration, and no higher rent must

(1) 17 Q. B. D. 738. (2) [1893] A. C. 562, 593.

be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises." That language, in my opinion, applies directly to the present case.

I think that the answer to the first question submitted to the Court in the special case must be in the negative, but this answer requires amplification. There is in my opinion no reason why the Court of Quarter Sessions should eliminate altogether from their consideration the question of tenant's profits. It may be that by first arriving at a conclusion as to what an ordinary commercial hypothetical tenant would be expected to pay as rent for this property, if he could use it to make a tenant's profit, they may consider that they would be guided to a more definite conclusion as to what the class of tenant, who alone would be expected to take the particular property, would be likely to give. If so, it is open to them to do so. They may think that such a tenant would give more rent for this property than a commercial tenant. If so, how much more is entirely for them. They may think that he would give the same. That again is entirely a matter for them. They may think that a consideration of what the commercial tenant would be likely to give is of no assistance. That again is a matter for them. The only question which the Quarter Sessions must treat as a matter of law is the character of the property which is under consideration, and with that point I have, I think, fully dealt.

The question submitted in the special case must, as I have pointed out, be answered in the negative. Although this in form appears to be a decision against the respondents' contention, it is obvious that this contention was only put forward in answer to the appellants' claim. It is this claim which has failed, and in my opinion the appeal must be dismissed with costs.

WARRINGTON L.J. (1) The appellants are the Port of London Authority, the owners and occupiers under the Port of London Act, 1908, of the Tilbury Docks, which were formerly the

(1) The judgment of Warrington L.J. was read by Bankes L.J.

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property of the London and India Docks Co. In ascertaining the net annual value of the hereditaments constituting the dock undertaking under s. 1 of the Parochial Assessments Act, 1836, the Assessment Committee and Quarter Sessions acting upon the decision in *Mersey Docks* v. *Liverpool Overseers* (1) have made no allowance for tenant's profit, that is to say for the profit which a hypothetical tenant of a commercial undertaking would be assumed to receive for himself.

The appellants contended before the Court of Quarter Sessions that the decision in the *Mersey Docks* v. *Liverpool Overseers* (1) was incorrect in point of law and that they were entitled to have such an allowance made. For the purpose of having this claim of the appellants determined the Court of Quarter Sessions have stated a special case and have framed the question for decision in the following form, namely, "Whether the Quarter Sessions were right in holding that they were precluded by law from making any allowance for tenant's profits." In so framing the question, they have treated it as one strictly of law, but at the same time it is obvious that their intention was to obtain a decision on the claim of the appellants, which was put forward as one of law. The Divisional Court, being bound by the case referred to, have answered the question in the affirmative, and have thus rejected the appellants' claim.

I think the real question is not whether the Quarter Sessions were, on the one hand, precluded from making, or, on the other hand, bound to make such an allowance, but whether they were entitled to make or refuse to make such an allowance, dealing with the question as one of fact to be decided upon a consideration of all the material circumstances affecting the case. The question of law is, in my judgment, what are the circumstances which should be taken into account?

Prior to the passing of the Port of London Act, 1908, the docks were vested in the London and India Docks Co., and the business thereof was carried on as an ordinary commercial undertaking for the profit of the company. By the Act the

(1) L. R. 9 Q. B. 84.

docks were transferred to the authority constituted by the Act and thereby directed to carry on the business, not with a view to private profit, but for the benefit of the port itself, the Act containing a provision that the ultimate balance, if any, on revenue account, after making the several payments by the Act prescribed, should be applicable to such purposes and in such manner for the benefit of the port as the authority might determine.

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The real question, I think, is whether the position of the authority under the provisions I have thus summarized is one of the circumstances which under the Act of 1836 the justices ought to take into account in estimating the annual value of the hereditaments, that is "the rent at which the same might reasonably be expected to let from year to year." It is now settled that in such a case as the present the public authority, owners of the hereditaments in question, although incapable of being actual tenants, ought to be taken into account as possible hypothetical tenants for the purpose of determining the rateable value of the hereditament: *London County Council* v. *Erith Churchwardens*. (1) If this be so, it seems to me to follow that the rent to be estimated is that which the authority owner would be prepared to pay—in other words, that the authority owner ought to be regarded, not merely as a possible hypothetical tenant, but as the tenant to be considered. This seems to me to follow from the mode of assessment held to have been rightly adopted in the *Erith Case* (1) and in *Reg.* v. *School Board for London*. (2) If this is so, then I think the position of the authority owner in reference to the mode in which the undertaking is to be carried on, and any restriction in reference to profits, must be material circumstances to be regarded in estimating what annual rent it would pay if instead of being owner it were the occupier in the same statutory position and subject to the same statutory restrictions.

In the *Dewsbury Waterworks Board* v. *Assessment Committee of Penistone Union* (3) the question was whether regard ought

(1) [1893] A. C. 562. (2) 17 Q. B. D. 738.
(3) 17 Q. B. D. 384.

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to be had to a certain statutory advantage enjoyed by the board, and this question was answered by the Court of Appeal in the affirmative. Lord Esher M.R. said (1): "The legal principle is this: You are to take the annual value . . . . of the property to be the rent which a hypothetical tenant from year to year would give for it if he had it upon the same terms as the actual owner . . . . has it. . . . . Where land is occupied by a local authority for public purposes the land is to be assessed to the poor rate at the rent which a tenant would pay, if subject to the same restrictions as are imposed, and entitled to the same advantages as are conferred, upon the local authority." The same principle was acted upon by the House of Lords in the case of a statutory restriction in *Sculcoates Union* v. *Dock Co. at Kingston-upon-Hull.* (2)

The statutory restriction in reference to the application of any ultimate profit is in my opinion one that affects the position of the authority in reference to its occupation of the docks and not merely as owner thereof independently of occupation, and, if this be so, then the principle—affirmed in *Jones* v. *Mersey Docks* (3)—that what the owner does or is bound to do with the supposed rent when he receives it may be disregarded, is inapplicable.

I come to the conclusion, therefore, that in determining the question of fact as to what is the annual value, the Quarter Sessions were right in taking into account the circumstance that no profit in the nature of a tenant's profit could be made by the authority and that the claim of the appellants to have as of right an allowance made for tenant's profits fails.

It remains to say a few words about the *Mersey Docks* v. *Liverpool Overseers.* (4) In that case a claim by the Mersey Dock Board, a public authority, for all material purposes subject to the same restrictions as to profits as the appellants in the present case, was rejected. So far as the decision, therefore, is concerned, I am of opinion that the *Mersey Docks Case* (4) was rightly decided. If the judgment of the Court decides that the rating authority was precluded by law from making

(1) 17 Q. B. D. 387.
(2) [1895] A. C. 136.
(3) 11 H. L. C. 443, 463.
(4) L. R. 9 Q. B. 84.

the allowance, then and then only it goes beyond that which is in my opinion the true position. But I think it may well be read as treating the question as one of fact—see particularly the passage at the top of p. 98—and so read it is entirely consistent with the view I have expressed. As to the reasoning of the learned judge who delivered the judgment, I confess with the greatest respect I cannot see the relevancy of his reference to the case of a tithe rent-charge. There seems to me to be no analogy between a fixed rent-charge and an annual revenue the amount of which may vary according to the mode in which the undertaking from which it proceeds is managed. In such a case the amount of the revenue may vary considerably according to the facilities afforded by the management to those who use the docks and the skill and judgment with which the business is conducted.

The result is that although the question put to the Court cannot be answered in the affirmative, and the case must therefore be remitted to Quarter Sessions for determination, I am of opinion that in arriving at the gross and rateable values respectively they are entitled either to decline to make or to make the allowance claimed according as on the facts they find themselves justified in adopting the one course or the other. I agree that the appeal substantially fails and must be dismissed with costs.

DUKE L.J. The Port of London Authority is rateable in the parish of Chadwell St. Mary in the county of Essex in respect of that part of the Tilbury Docks which lies within the parish. By reason of the statutory conditions of the authority's undertaking it is agreed by the parties that the figures of gross estimated rental and net annual value upon which the amount of the authority's assessment will depend can properly be arrived at by a calculation based upon the receipts and expenses of the authority in respect of the hereditament. The Court of Quarter Sessions, proceeding by that method, has fixed the gross estimated rental at 106,863*l.* and the net annual value at 52,063*l.*, and upon the

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authority of *Mersey Docks* v. *Liverpool Overseers* (1) has rejected the claim of the appellants to be entitled to an allowance for tenant's profits in reduction of the amount of the assessment. The case raised before us by the appellants was as nearly as possible identical with that which was raised in the Court of Queen's Bench on behalf of the Mersey Docks Board in the case cited.

The appellants contended that in the computation of the rateable value of the premises they are entitled to such a deduction on account of tenant's profits as would be made in any case of a trading body, the argument being, as was that of the Mersey Docks Board: "The premises are to be rated at what a hypothetical tenant would give from year to year, and no such tenant would take the premises if he could not make a profit." The appellants, therefore, necessarily sought to overrule the judgment in *Mersey Docks* v. *Liverpool Overseers.* (1)

In order to test the validity of the arguments for the appellants it is necessary to see how the law stands with regard to the rating of the Tilbury Docks, apart from the decision given in the case whose authority they challenge. It was not and could not be disputed, that the hereditament must be rated under the conditions which the Legislature has imposed upon it, that is to say as a property capable of being used to produce an income which is strictly regulated by statute. With regard to such a hereditament, as with regard to a shop, a dwelling-house, or a farm, the question to be determined by the rating authority is "a simple question of fact," namely, as was said by Lord Halsbury L.C. in *Mersey Docks and Harbour Board* v. *Birkenhead Assessment Committee* (2): "What is the rent which a tenant might reasonably be expected to give for the premises, subject to the deductions mentioned in the statute, as a tenant from year to year?" Reference is made in the same opinion of Lord Halsbury to the numerous judgments "of an advisory character" which guide rating authorities in the performance of their task. Some of these judgments are helpful in this case. It is clear that the Port

(1) L. R. 9 Q. B. 84. (2) [1901] A. C. 175, 180.

of London Authority may be deemed to be the hypothetical tenant whose rent from year to year is to be estimated: *Reg.* v. *School Board for London.* (1) Then, as was said by Lord Collins in *Davies* v. *Seisdon Union* (2): "The parish is entitled to an assessment based on the highest rent that the hypothetical tenant may reasonably be supposed willing to give." "No higher rent," Lord Herschell L.C. said in the *Erith Case* (3), "must be fixed as the basis of assessment than that which it is believed the owner would really be willing to pay for the occupation of the premises." It is the rent which the hypothetical tenant would really be willing to pay, however, and not an intermediate sum between, or average of, that rent and the rent which might be paid by some tenant of another character. The amount a commercial tenant would have paid was excluded from the calculation of the net annual value of the schools of the London School Board: *Reg.* v. *School Board for London.* (1) In like manner the competitive or commercial value of the hereditament was wholly rejected from the basis of assessment applied by Lord Herschell in the *Erith Case* (3) in examining the decision of this Court with regard to the rating of Owens College, Manchester. It seems to me to be established that when in a case like the present the annual value of the premises to the owner in occupation is higher than the rent which a commercial tenant would pay, the market value for commercial purposes may be disregarded and the actual value to the owner in occupation may determine the amount of the assessment. The property produces income, and it is permissible and may be necessary to "find out what money can be made out of it": *Cartwright* v. *Sculcoates Union.* (4) Regard may also be had to the fact that the premises afford to the owner in occupation under statutory conditions the means of discharging his statutory duties: *Davies* v. *Seisdon Union.* (5) The rating authority may not assess the appellants on a larger income than that which can be earned under the only conditions in which the appellants are allowed to earn an income at all: *Sculcoates*

(1) 17 Q. B. D. 738.
(2) [1908] A. C. 315, 320.
(3) [1893] A. C. 562, 593.
(4) [1899] 1 Q. B. 667, 675.
(5) [1908] A. C. 315.

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Union v. *Dock Co. at Kingston-upon-Hull.* (1) But they ought not artificially to reduce the assessment on the ground that a hypothetical tenant who could make nothing from the use of the premises would pay no rent for them. Inquiry as to such a tenant would be in point of fact irrelevant and misleading. The decisive question is this—whether the rent the Port of London could reasonably be expected to pay in order to carry out its statutory duties at the Tilbury Docks is less than the total surplus of its receipts beyond the expenditure whereby the receipts are earned, 52,063*l.* The Court of Quarter Sessions appears to have been minded to answer this question in the negative. If not, it will be in a position to state and give effect to its actual conclusion.

I revert now to the question actually raised in the case stated by Quarter Sessions and to the decision of the Court of Queen's Bench in *Mersey Docks* v. *Liverpool Overseers.* (2) The judgment there given was criticized most directly by the appellants on the ground of a supposed mistaken analogy between the assessment of a rent-charge and the assessment of a statutory undertaking such as the Mersey Docks. I think there was no mistake of the kind suggested. The judgment does not decide that a dock is to be assessed by the same method as a rent-charge. It does insist that in assessing every hereditament regard must be had to its actual character and to the mode in which as a matter of fact it could and would be made the subject of business dealings. In my respectful opinion, the case was rightly decided.

The question asked by Quarter Sessions ought to be answered in the negative, on the ground that the refusal of an allowance for tenant's profits in abatement of the net annual value of the docks depends upon questions of fact and is to be determined upon by the rating authority in accordance with its decision of those questions. In substance the appeal fails.

Appeal dismissed.

Solicitors for appellants: *E. F. Turner & Sons.*

Solicitors for respondents: *Hatten & Asplin.*

(1) [1895] A. C. 136, 150. (2) L. R. 9 Q. B. 84.

W. H. G.

[IN THE COURT OF APPEAL.]

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March 5, 6.

COUNTY HOTEL AND WINE COMPANY, LIMITED v. LONDON AND NORTH WESTERN RAILWAY COMPANY.

[1916 C. 2541.]

Railway—Refreshment Room—Option of renting—Construction of Covenant.

In 1853 a certain railway company, who were the predecessors in title of the defendants, demised some land adjacent to one of their railway stations to a lessee for 999 years upon the terms that he should erect and keep a hotel thereon. The lease contained a covenant by the railway company in these terms: "That the tenant or occupier of the said hotel shall have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations to be from time to time fixed by the committee for the management of the Carlisle Joint Station in preference to any other party, it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms."

The plaintiffs occupied the hotel as assignees of this lease. They also occupied the refreshment rooms as yearly tenants until the defendants, who had succeeded to all the rights and liabilities of the railway company, gave notice to the plaintiffs to quit, and determined their tenancy, purposing themselves to take over the management and control of the refreshment rooms. The plaintiffs, having obtained an assignment of the original lessee's rights under the above covenant, claimed a declaration that the defendants were under an obligation to put and keep the occupier of the hotel in occupation of the refreshment rooms:—

Held, that the true meaning and effect of the covenant was that if and when the railway company were minded to offer the refreshment rooms at a rent to anyone, the occupier of the hotel should have the option of taking them at that rent; but that if the railway company themselves undertook the supply of refreshments the occupier of the hotel had no such option.

Judgment of McCardie J. [1918] 2 K. B. 251 affirmed on other grounds.

APPEAL from the judgment of McCardie J. reported [1918] 2 K. B. 251.

By an indenture dated August 1, 1853, the Lancaster and Carlisle Railway Company, in consideration of the yearly rent covenants and agreements therein reserved and contained, leased to George Head Head his executors administrators and limited assigns a plot of ground therein described to have and to hold from the date thereof for the full term of 999

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years. Head covenanted to pay the rents reserved and to erect partly upon the land demised and partly on other land a first-class hotel for the use and accommodation of passengers arriving at the Citadel Station, Carlisle, and to cause the same to be kept and conducted in a proper efficient and orderly manner so as to afford convenient accommodation to persons travelling by the different lines of railway converging at Carlisle and using the Citadel Station and from time to time to apply for and do or cause to be done whatsoever should be requisite for obtaining and keeping on foot a licence to sell spirituous and excisable liquors by retail at the hotel and sufficiently to repair maintain and keep the premises in good and substantial repair and to yield them up at the end or sooner determination of the term to the Lancaster and Carlisle Railway Company their successors and assigns. There was a proviso for re-entry on breach of covenant by the lessee. The Lancaster and Carlisle Railway Company covenanted that they would on the request of Head erect and build and keep in repair a covered passage in the style and of the dimensions already approved of by him leading from the hotel in the direction shown upon a plan from A to B and would at all times during the continuance of the term if the tenant of the hotel should also be the occupier of the refreshment rooms maintain and keep the passage in good repair for the use of Head his executors administrators or limited assigns or his or their tenant of the hotel being also tenant of the refreshment rooms as a communication between the hotel and the platform of the Citadel Station during so much of the term as the tenant of the hotel should continue tenant of the refreshment rooms. The company also for themselves and their successors and assigns covenanted with Head his executors administrators and limited assigns that the company and their successors and assigns would permit the tenant or occupier of the hotel for the time being and his servants to have access to the platforms of the said station in the same manner and under the same rules and regulations and restrictions as was then permitted by the London and North Western Railway Company to the occupier

of the Euston and Victoria Hotels in reference to the Euston Station platforms of the London and North Western Company. The covenant continued in these terms: "And that the tenant or occupier of the said hotel shall have the option of renting the refreshment rooms of the said station at the rent and subject to the rules and regulations to be from time to time fixed by the committee for the management of the Carlisle Joint Station in preference to any other party, it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms."

In 1860 Head granted a sub-lease of the hotel to one Breach for a term of twenty-one years, and the Lancaster and Carlisle Railway Company granted a lease of the refreshment rooms to Breach for the same period. This lease contained provisions for the proper maintenance and good conduct of the refreshment rooms. It also provided that the lessee should conduct the business of these rooms to the satisfaction of the lessors, and enabled them to determine the lease if the rooms were not so conducted.

The plaintiff company having been registered under the Companies Act, 1862, Breach assigned to them all his interest in the hotel and refreshment rooms. Further, by an indenture dated August 29, 1866, Head assigned to the plaintiffs the lease of August 1, 1853, and "All that piece of land comprised in and demised by the said indenture of lease of the first day of August, 1853 . . . . and all and singular other the premises comprised in and demised by the said hereinbefore in part recited indenture of lease of the first day of August, 1853, with all and every the rights easements privileges and appurtenances to the same premises or any part thereof belonging or in anywise incident or appertaining and all the estate right title interest possession property claim and demand whatsoever both at law and in equity of the said George Head . . . . to or respecting the said premises."

From 1866 onward the plaintiffs managed and conducted both the hotel and the refreshment rooms. Access from the hotel to the platform was gained by the passage referred

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to in the deed of August 1, 1853. After the expiration of the twenty-one years' lease granted to Breach by the Lancaster and Carlisle Railway Company in 1860 the occupation of the refreshment rooms was continued by the plaintiff company at a yearly rent and subject to such terms of the deed of 1860 as were applicable to such an occupation.

On March 24, 1916, the defendants served a six months' notice on the plaintiffs to determine their occupation of the refreshment rooms. On July 14, 1916, the plaintiffs served on the defendants a written notice stating their desire to exercise the option contained in the indenture of August 1, 1853, and requesting the defendants to inform them of the terms proposed for a new tenancy. The defendants having ignored this notice, the plaintiffs on September 29, 1916, gave up possession of the refreshment rooms, and the defendants took them into their own management and control. On October 16, 1916, the plaintiffs secured an assignment from the representatives of Head, who had died in 1876, of "all that the benefit right title and interest (if any) now remaining outstanding or otherwise vested of and in the railway obligations in them or any or either of them." The assignment recited the indenture of August 1, 1853, and the option clause contained therein. Written notice of this assignment having been given to the defendants the plaintiffs issued the writ in the present action on November 2, 1916, and claimed (1.) a declaration that upon the true construction of the lease of 1853 . . . . the defendants are under an obligation to put and keep the occupier of the plaintiffs' hotel at the Citadel Station in occupation of the refreshment rooms of such station for the time being used by the defendants and of the covered passage upon the terms of paying therefor a fair market rent; (2.) damages for the breach of that obligation by the defendants.

McCardie J. held that the option clause was void for uncertainty; and that, if not unenforceable on that ground, it was ultra vires. He therefore gave judgment for the defendants.

The plaintiffs appealed.

Langdon K.C. and *Eustace Hills* for the appellants.

Disturnal K.C., *Underhill* and *Barrington-Ward* for the respondents.

The view taken by the Court on the construction of the option clause in the lease of August 1, 1853, renders it unnecessary to report the arguments of counsel.

BANKES L.J. This is an appeal from McCardie J. who dealt elaborately with a number of points necessary to be considered upon his construction of the material clause of the deed of 1853. I am unable to agree with the learned judge's view of that clause. That being so, it is not material, and we are not asked, to consider the many matters discussed and decided in the Court below.

The action was brought by the appellants, the successors in title of the George Head Head who was a party to the deed of 1853. The respondents were by a statute of 1879 placed in the position formerly occupied by the Lancaster and Carlisle Railway Company. The dispute between the parties has reference to an alleged right of the appellants to occupy the refreshment rooms at Carlisle Station. In the year 1846 an Act was passed enabling the Lancaster and Carlisle Railway Company to enlarge and extend their station. In pursuance of that Act, at some time between 1847 and 1853, the existing station or part thereof was constructed with, as we are told, a refreshment room on the up platform. The station being used by a number of railway companies was managed by a committee consisting of representatives of the various companies, and known as the Citadel Committee. It appears from some of the cases cited to us that the policy of railway companies in different parts of the country was formerly to grant leases for long periods to contractors or tenants who should supply passengers with refreshments: *Rigby* v. *Great Western Ry. Co.* (1) and *Flanagan* v. *Great Western Ry. Co.* (2) are instances of this practice. In the present case the indenture, a clause of which we have to construe, was dated August 1, 1853, and made between the Lancaster

(1) (1846) 15 L. J. (Ch.) 266. (2) (1868) L. R. 7 Eq. 116.

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and Carlisle Railway Company of the one part and George Head Head of the other part. [The Lord Justice stated the effect of the indenture and the covenants contained therein anterior to the option clause, and proceeded :] Then comes the clause upon which the dispute has arisen. In the view of the learned judge its language is so indefinite as to be incapable of any reasonable construction. Upon that point it is not necessary to express an opinion. I would only say that a clause is not necessarily incapable of enforcement because it is difficult of construction. The learned judge also held, after strenuous argument, that if the appellants' construction prevailed, the clause was ultra vires. The weight of that decision must depend to a large extent upon the construction to be put upon the clause. McCardie J. arrived at his conclusion by taking the covenant to mean that the railway company were bound in all circumstances to allow the appellants an option to take the refreshment rooms at a rent. I cannot agree with that construction. The language of the covenant is this : "And the said company for themselves and their successors and assigns do hereby covenant with the said George Head Head his executors administrators and limited assigns that the said company and their successors and assigns shall permit the tenant or occupier of the said hotel for the time being and his servants to have access to the platforms of the said station in the same manner and under the same regulations and restrictions as is now permitted by the London and North Western Railway Company to the occupier of the Euston and Victoria Hotels in reference to the Euston Station platforms of the London and North Western Company." This is an example of the loose drafting of the deed. It leaves the rights of the grantee to be ascertained by reference to matters outside the deed. I would observe that the access provided for is to the platforms of the station, not only to those which then existed but to those which may exist from time to time as the station is altered or developed. The covenant proceeds : "and that the tenant or occupier of the said hotel shall have the option of renting the refreshment rooms of the said station at the rent and subject to the rules

and regulations to be from time to time fixed by the committee for the management of the Carlisle Joint Station in preference to any other party." So far the covenant is clear; it is for an option of renting in preference to any other party. Then follow words on which counsel for the appellants laid the greatest stress, I mean the words indicating the intention and wish of the parties "that the same persons shall have the option of occupying the said hotel and refreshment rooms." It is said that the intention and wish of the parties, and therefore the effect of the deed, is that the occupation of the hotel and of the refreshment rooms shall be by the same person; that this two-fold occupation cannot exist unless an opportunity is given to the occupier for the time being of the hotel to become the occupier of the refreshment rooms; and that it is only possible if the tenant or occupier of the hotel has a right at all times to insist that the railway company shall offer the refreshment rooms to some person at a rent, and, if they do that, they must give the occupier or tenant of the hotel the option provided for in the clause. I do not think it is possible to accede to this argument unless we are prepared to read into the clause an implied covenant by the railway company that they will not themselves at any time during the period covered by the covenant undertake the supply of necessary refreshments in these refreshment rooms. I find nothing in the clause implying such a covenant. Unless there is such a covenant they may themselves provide the refreshments; they need not offer the refreshment rooms to anyone; if they do not offer them at all, the occasion for the appellants' option does not arise. The option is an option of renting in preference to any other party. That is to say, if and when the railway company offer the refreshment rooms at a rent to anyone, the present appellants, in the events which have happened, have the option of renting them. But if and when the railway company themselves undertake the supply of refreshments the clause relating to the option no longer applies. On these grounds in my opinion the learned judge was wrong in his construction of this clause, and the appeal fails. I have not mentioned the provisions with regard to

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the covered passage because it was agreed that the right to the passage stands or falls with the right to occupy the refreshment rooms.

WARRINGTON L.J. I am of the same opinion. The respondents, as successors of the Lancaster and Carlisle Railway Company, are the owners of the reversion expectant on the termination of a lease for 999 years of a hotel nearly adjoining Carlisle Station, and they are also the owners of the Carlisle Station and the refreshment rooms in that station. The appellants are the present occupiers of the hotel, and they have until recently been also the occupiers of the refreshment rooms. The appellants allege that the respondents, the railway company, in breach of an obligation said to be contained in the lease under which they occupy the hotel, have refused to offer to them a fresh tenancy of the refreshment rooms on the expiration, on September 29, 1916, of their previous tenancy. In fact the respondents have not let the refreshment rooms to any person, but, on the termination of the appellants' tenancy, they resumed possession of the rooms themselves and retain it. The question is whether by so doing they have committed a breach of the obligation I have referred to. The learned judge on the construction of the covenant decided that they had, but that the appellants are not entitled to recover, on the ground that the covenant is void for uncertainty, incapable of construction, and ultra vires. If the true construction is not that which the learned judge put upon the covenant, then those other questions do not arise. He took the covenant as meaning that the railway company were bound in all circumstances to offer to the occupier of the County Hotel the right to occupy these refreshment rooms at a rent to be fixed as provided by the deed. I cannot agree with that view. There is an alternative view which the learned judge rejected, but which in my opinion is the true view—namely, that the covenant only confers on the occupier of the County Hotel the right to have the first refusal; that is to say, if the company propose to let the refreshment rooms they must offer them in the first instance

to the occupier of the County Hotel. The covenant is contained in a lease dated August 1, 1853. It is a covenant that "the tenant or occupier of the said hotel shall have the option of renting the refreshment rooms of the station . . . . in preference to any other party." . . . . Pausing there, I take that as meaning that if the company are proposing to let the refreshment rooms at a rent, they shall let them at that rent to the occupier of the hotel in preference to any other party. It contains no obligation on the part of the company to let these premises at a rent. If they choose to occupy them themselves there is nothing in this covenant to prevent them from so doing. The next words are "it being the intention and wish of the said parties hereto that the same person shall have the option of occupying the said hotel and refreshment rooms." It is said that these words impose an absolute obligation on the railway company that the same person shall occupy the hotel and the refreshment rooms. In my view the words are superfluous in that they express an intention apparent already from the terms in which the option has been granted, and inaccurate in that they speak of an option of occupying the hotel. What they really mean is that the occupier of the hotel shall have an option of occupying the refreshment rooms. That is only expressing in other words what has been expressed already by giving the occupier of the hotel the option of renting the refreshment rooms. That this is the meaning of the covenant is, I think, reasonably clear. If that is so, the railway company by resuming possession and not offering an option to the appellants have committed no breach of their obligation. As to the other points I express no opinion. This construction of the covenant, if adopted, avoids them and lessens the force and effect of much that the learned judge said on the question of ultra vires. I agree that the appeal must be dismissed.

DUKE L.J. I agree. The decisive question is what was the extent of the privilege which the Lancaster and Carlisle Railway Company bound themselves by covenant to grant to the lessee and his successors in the Station Hotel at Carlisle.

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I am satisfied that on the true construction of the covenant the company did not preclude themselves from taking the refreshment rooms into their own hands and themselves purveying refreshments there, and that, as Warrington L.J. has said, what they covenanted to do was to give the tenant of the hotel the first refusal of the tenancy of the refreshment rooms in case of letting. The case for the plaintiffs would have been stronger if the covenant had been for an option to rent, but it was not. It was a covenant for an option to rent in preference to other persons. The force of that limited covenant is not extended by the explanatory words as to the wish and intention of the contracting parties. I confess I am helped to my conclusion by the reflection that an agreement by the railway company binding themselves for 999 years to use part of their station in a particular way might well be ultra vires. That difficulty is avoided by the construction upon which the Court is agreed.

Appeal dismissed.

Solicitors for appellants: *James & James, for Clutterbuck Trevenen & Steele, Carlisle.*

Solicitor for respondents: *M. C. Tait.*

W. H. G.

DAVIES *v.* THOMAS OWEN & COMPANY, LIMITED.

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April 15.

[1917 D. 414.]

Factory--Fencing of Machinery—Commercially impracticable to fence securely Machinery—Injury to Workman—Liability of Occupier of Factory—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *s.* 10, *sub-s.* 1 (*c*).

Sect. 10, sub-s. 1, of the Factory and Workshop Act, 1901, provides that "with respect to the fencing of machinery in a factory, the following provisions shall have effect:— . . . . (*c*) All dangerous parts of the machinery and every part of the mill gearing must either be securely fenced, or be in such position or of such construction as to be equally safe to every person employed or working in the factory as it would be if it were securely fenced":—

Held, that the obligation imposed by this sub-section is absolute and is unaffected by the fact that with regard to some particular machine it may be commercially impracticable or mechanically impossible to fence it securely.

While the plaintiff, who was employed in the defendants' factory, was at work he was injured by a machine not being securely fenced, but as to which the jury found that it was commercially impracticable to fence it securely, and that if it were fenced it would be more dangerous than in its then condition. In an action claiming damages for the injuries sustained:—

Held, that as the obligation imposed upon the defendants to fence securely the machine was absolute, and as they had failed in this duty they were liable in damages.

FURTHER CONSIDERATION by Salter J. of an action tried by him at Cardiff.

The plaintiff was employed by the defendants in their factory as an assistant machineman. While at work his hand was crushed by the rollers of a calender pressing and finishing machine, and in respect of his injuries he sued the defendants to recover damages. He alleged that the defendants negligently and in breach of their statutory duty did not securely, or at all, fence the dangerous parts of the machine, but allowed them to remain in an unfenced and dangerous condition; and further that they did not provide a proper platform for the plaintiff to stand upon when employed in attending to the machine.

The defendants denied negligence on their part. They alleged that the rollers of the machine in question could not

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have been fenced without destroying the utility of the machine; that the plaintiff had been guilty of contributory negligence; and that if the machine or platform were in fact dangerous the plaintiff knew and appreciated the danger and voluntarily undertook the risk of working the machine.

The judge left certain questions to the jury which with their answers thereto were, so far as material for the purposes of this report, as follows: "Was the calender a dangerous part of the machinery? Yes. Was the calender securely fenced? No. But in the opinion of the jury secure fencing is impracticable. Did the defendants provide a proper and sufficient platform? Yes. Was the accident caused by (*a*) the calender being unfenced? Yes. (*b*) The platform being insufficient? No. Was the accident caused or contributed to by the negligence of the plaintiff? No. Did the plaintiff elect to take the risk of working on this calender with full knowledge and appreciation of the risk he ran? Yes. What damages (if any)? 100*l*." In reply to the judge as to the meaning of their answer to the question "Was the calender securely fenced?" the jury further said: "In the view of the jury the machine if fenced would be of practically no commercial value. The jury think that if this machine was fenced it would be more dangerous than in its present condition."

Wilfred Lewis for the plaintiff. The plaintiff is entitled to judgment on the findings of the jury. The accident was due to the fact that the calender was not securely fenced, and the maxim volenti non fit injuria has no application where injury arises from the breach of a statutory duty: *Baddeley* v. *Earl Granville*. (1)

Sir Ellis Griffith K.C. and *Lincoln Reed* for the defendants. We do not contend that the maxim volenti non fit injuria applies in this case, but the defendants are entitled to judgment on the jury's findings. In enacting s. 10, sub-s. 1, of the Factory and Workshop Act, 1901 (2), the object of the Legislature was to secure that factories should be made safe

(1) (1887) 19 Q. B. D. 423.

(2) The sub-section is set out in the headnote.

for workmen. The defendants have complied with that requirement, for the jury have found that if the calender had been fenced it would have been more dangerous than it was at the time of the accident. It was not intended by the Legislature to eliminate dangerous machinery from factories, but only that it should be rendered as safe as practicable consistently with its commercial use. That condition was satisfied in this case.

SALTER J. after stating the nature of the action and referring to the answers by the jury to the specific questions left to them and their additional answers, continued: I propose to deal with this case on the footing that the additional statements made by the foreman of the jury are to be taken as part of the jury's answers. These statements amount to a finding that to fence securely this dangerous machinery was commercially and mechanically impracticable. As to the allegation of negligence at common law it is clear that the plaintiff fails, but with regard to the issue of breach of statutory duty in my opinion the plaintiff succeeds. The obligation imposed by the Factory and Workshop Act, 1901, in relation to the fencing of dangerous machinery, is absolute. It is an obligation not merely to fence, but to fence securely. The statute does not say that dangerous machinery shall be securely fenced if that is commercially practicable or mechanically possible. If a machine cannot be securely fenced while remaining commercially practicable or mechanically useful the statute in effect prohibits its use. The words of s. 10, sub-s. 1 (*c*), are not that dangerous machinery is to "be in such position or of such construction as to be equally safe . . . . as it would be if it were fenced" but is to "be in such position or of such construction as to be equally safe . . . . as it would be if it were *securely* fenced." The workman is entitled to have secure fencing in fact and the findings of the jury show that this machine was not securely fenced. The observations of the jury to the effect that secure fencing is commercially and mechanically impracticable are irrelevant, and I think that the plaintiff has proved a breach of a statutory duty

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and damage caused to him thereby. That being so, the only defence remaining to the defendants is that embodied in the maxim volenti non fit injuria. That would have afforded a good defence to a claim at common law for damage caused by negligence, but it is clear from the decision in *Baddeley* v. *Earl Granville* (1) and from the observations in *Thomas* v. *Quartermaine* (2) that the maxim affords no defence where the plaintiff can show that the injury he has sustained has been the direct consequence of a breach by the defendant of an express statutory duty imposed upon him. For these reasons the plaintiff is entitled to judgment.

Judgment for plaintiff.

Solicitors for plaintiff: *Smith, Rundell, Dods & Bockett for Harold M. Lloyd, Cardiff.*

Solicitors for defendants: *Pritchard, Englefield & Co., for W. B. Francis & Cooke, Cardiff.*

(1) 19 Q. B. D. 423. (2) (1887) 18 Q. B. D. 685.

J. S. H.

[IN THE COURT OF APPEAL.]

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March 6, 7.

MUSGROVE *v.* PANDELIS.

[1917 M. 1902.]

Fire—Liability for Damage—Defence that Fire "accidentally began"—Negligence—Failure to extinguish—Motor Car—Dangerous Object—Fires Prevention (Metropolis) Act, 1774 (14 *Geo.* 3, *c.* 78), *s.* 86.

By s. 86 of the Fires Prevention (Metropolis) Act, 1774, no action " . . . . shall be had, maintained, or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . . accidentally begin . . . . "

The plaintiff occupied rooms over a garage. Part of the garage was let to the defendant, who kept a motor car there. The defendant's servant, who had little skill as a chauffeur, having occasion in the course of his employment to move the motor car, started the engine, and from some unexplained cause, and without negligence on the part of the servant, the petrol in the carburettor caught fire. If the servant had promptly turned off the tap leading from the petrol tank to the carburettor, the fire would have harmlessly burnt itself out. But he failed to do this; and the fire spread and burnt the car, the garage, and the plaintiff's rooms and furniture.

The plaintiff brought an action for damages. The defendant pleaded that the fire " accidentally began " within the meaning of the above enactment. The judge at the trial found that the defendant's servant was negligent in not promptly turning off the petrol tap:—

Held: (1.) that the Act did not protect a person who brought upon his premises an object likely to do damage if not kept in control, and that a motor car ready to start, or such a car in charge of an unskilled chauffeur, was an object of that kind.

(2.) That the fire which caused the damage was not that which took place in the carburettor, but was the fire which spread to the car; and that this fire did not begin accidentally but was caused by the negligence of the defendant's servant.

Held, consequently, that the defendant was liable.

Judgment of Lush J. [1919] 1 K. B. 314 affirmed.

APPEAL from the judgment of Lush J. reported [1919] 1 K. B. 314.

The plaintiff was the lessee of a house at Westcliff-on-Sea with certain buildings at the rear of it including a garage with rooms above. He let the garage to one Head. Head

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kept two cars there and let to the defendant a part of the garage in which the defendant kept a car. There was in the defendant's employment a man named Coumis, who was really a clerk. He had taken some lessons in driving but was not a skilled chauffeur nor a trained mechanic, and he had only an elementary knowledge of the mechanism of a motor car.

On October 12, 1917, Coumis in the course of his employment went to clean one of the cars. He found it close up against the back wall of the garage in an inconvenient position for cleaning, and set himself to move it by its own power into a more accessible place. He applied the pressure pump, turned on the petrol tap to allow the flow of petrol from the tank to the carburettor, and started the engine. Then for some unexplained reason a flash and an explosion took place in the carburettor and the petrol in the carburettor took fire. Coumis wasted time in looking for a cloth with which to extinguish this fire, instead of immediately turning off the petrol tap which when closed would have prevented any further flow of petrol into the carburettor with the result that the fire would have burnt itself out harmlessly. When it occurred to him to turn off the petrol the fire had gained such force that he could not reach the tap, and burnt his hand in the attempt. The supply of petrol continued and the fire extended till it enveloped the car, then the other cars in the garage, and ultimately the plaintiff's premises and furniture.

The plaintiff brought an action to recover damages for the injury to his property. The defendant relied on s. 86 of the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78), which provides that "No action, suit, or process whatever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall . . . . accidentally begin nor shall any recompence be made by such person for any damage suffered thereby, any law, usage or custom to the contrary notwithstanding. . . . ."

The action was tried before Lush J., who held that this enactment had no application to a case which fell, as in his

view this case fell, within the principle of *Rylands* v. *Fletcher*. (1) Further he held that the fire which caused the damage did not begin accidentally, but as the result of the negligence of Coumis. He therefore gave judgment for the plaintiff.

The defendant appealed.

Hawke K.C. and *Zeffertt* for the appellant. The learned judge was wrong in holding that a motor car is a dangerous thing which a man keeps on his property at his peril. Apart from an accident, it is most unlikely that a motor car will catch fire. If it catches fire accidentally, the case comes within the protection of the Fires Prevention (Metropolis) Act, 1774, s. 86. In the present case the fire began when the petrol in the carburettor became ignited, and that happened accidentally, as Lush J. has found. The learned judge arrived at his decision by regarding this fire in two stages and by treating the stages as two separate fires. There is no authority for so treating what is in truth one fire. It does not become a new fire as often as it reaches a new object. If it does, the protection of the statute is almost negligible.

[DUKE L.J. At common law if a fire broke out suddenly in my house without my knowledge and burnt my goods and also the house of my neighbour, he had an action on the case against me. (2) The statute was intended to give protection in that case.]

There are few fires which cannot be extinguished at some stage. If at every stage there is a new fire, and failure to extinguish it is evidence of negligence, little effect will be given to the intention of the Legislature. In *Vaughan* v. *Menlove* (3) and *Filliter* v. *Phippard* (4) the defendant's negligence was the original cause of the fire.

In any case Coumis was not negligent in failing to act with perfect presence of mind, accurate judgment, and promptitude on a sudden emergency: *Jones* v. *Boyce* (5); *The Bywell Castle*. (6)

(1) (1868) L. R. 3 H. L. 330.
(2) Roll. Abr. Action sur Case B.
(3) (1837) 3 Bing. N. C. 468.
(4) (1847) 11 Q. B. 347.
(5) (1816) 1 Stark. 493.
(6) (1879) 4 P. D. 219.

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J. B. Matthews K.C. and *Moyses* for the respondent were not called on.

BANKES L.J. after stating the facts proceeded as follows:— The plaintiff brought this action alleging that the fire was the result of Coumis's negligence. The negligence finally relied on was that he did not instantly turn off the petrol tap and so stop the further flow of petrol into the carburettor. If that had been done, according to the evidence which the learned judge accepted, the fire would have exhausted itself without doing any damage. The defendant's main defence, apart from disputing the negligence, was founded on s. 86 of the Fires Prevention (Metropolis) Act, 1774, and the argument has been chiefly directed to the construction of that enactment. Lush J. took the view that the statute did not apply at all; and I agree. He also held that, if that view was not correct, the fire which caused the damage did not accidentally begin within the meaning of the Act. And there also I agree. Sect. 86 of this Act was passed to take the place of a section in almost the same words of the Act of 6 Ann, c. 31, s. 6. In order to see what alteration these statutes effected it is material to consider the state of the law before the earlier statute was passed. A man was liable at common law for damage done by fire originating on his own property (1.) for the mere escape of the fire; (2.) if the fire was caused by the negligence of himself or his servants, or by his own wilful act; (3.) upon the principle of *Rylands* v. *Fletcher*. (1) This principle was not then known by that name, because *Rylands* v. *Fletcher* (1) was not then decided; but it was an existing principle of the common law as I shall show presently. The alteration which those statutes effected was to give protection in cases falling under the first heading of liability mentioned above. It is thus stated by Lord Denman C.J. in *Filliter* v. *Phippard* (2): "The ancient law, or rather custom of England, appears to have been, that a person in whose house a fire originated, which afterwards spread to his neighbour's property and destroyed it, must make good the loss." That

(1) (1868) L. R. 3 H. L. 330. (2) 11 Q. B. 347, 354.

was the principle of the common law to which the statutes were directed. They altered the law so as to exclude the liability of a "person in whose house, chamber, stable, barn, or other building, or on whose estate any fire shall . . . . accidentally begin." It is plain that the statutes did not touch the other heads of liability at common law. The second head is not within the protection; that was decided by *Filliter* v. *Phippard* (1), where it was held that the Act of Geo. 3 did not apply to a fire which was caused either deliberately or negligently. Why, if that is the law as to the second head of liability, should it be otherwise as to the third head, the liability on the principle of *Rylands* v. *Fletcher* (2)? If that liability existed, there is no reason why the statute should alter it and yet leave untouched the liability for fire caused by negligence or design. That the principle of *Rylands* v. *Fletcher* (2) existed long before that case was decided is plain. In *Vaughan* v. *Menlove* (3) Tindal C.J. says (4): "There is a rule of law which says you must so enjoy your own property as not to injure that of another." Park J. says: "Although the facts in this case are new in specie, they fall within a principle long established, that a man must so use his own property as not to injure that of others." *Rylands* v. *Fletcher* (2) is merely an illustration of that old principle, and in my opinion Lush J. was right in saying that this case, if it falls within that principle, is not within the protection of the statute.

The question then, is whether this motor car, with its petrol tank full or partially filled with petrol, was a dangerous thing to bring into the garage within the principle of *Rylands* v. *Fletcher* (2)? Mr. Hawke says a motor car is not a dangerous thing unless it is in such a condition that an accident is to be apprehended. But the expectation of danger is not the basis of the principle of *Rylands* v. *Fletcher*. (2) A thing may be dangerous although the danger is unexpected. I agree with Lush J. that this motor car was dangerous within that principle. The defendant brought it, or caused it to be

(1) 11 Q. B. 347.
(2) L. R. 3 H. L. 330.
(3) 3 Bing N. C. 468.
(4) Ibid. 474, 476.

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brought upon his premises, and he is responsible for the fire which resulted, and is not within the protection of the statute.

The other point raised the question what is the meaning of the expression "fire" to which the statute refers when it speaks of a person in whose house, chamber, stable, etc., "any fire shall . . . . accidentally begin." The statute is dealing with a fire which occasions damage, and it is in reference to that fire that it says no action shall be maintained nor shall any recompence be made by such person for any damage suffered or occasioned thereby. No more can be said as matter of law than that the fire contemplated by the Act is the fire which causes the damage, and so it is necessary in each case to consider what that fire was in view of the facts of that particular case. In this case it is impossible to say that the spark which originally ignited the petrol, though no doubt it was the original cause of the fire, was the fire which caused the damage. As well might it be said that a housemaid striking a match to light her master's fire causes the fire which ultimately consumes the house because it originated from the match she struck. In this case the fire which caused the damage began when the flaming petrol acquired such volume as to become a source of danger. So long as the fire was merely the ignition of a small amount of petrol, which if left to itself would have burnt itself out in the carburettor, it was like the housemaid's match; but when it became a raging fire supplied from the petrol tank so that it spread to parts of the car and from them to the property, this was the fire which caused the damage. It did not accidentally begin. It was the direct result of Coumis's negligence in not turning off the petrol tap. This was the view which Lush J. took of the facts, and I agree with him.

Mr. Hawke contended that negligence ought not to be imputed to Coumis; that he was placed in a difficult position, and cannot be blamed for not having taken the best possible course on the first possible opportunity. That is a point of much weight which was properly pressed upon the Court

below and in this court; but it was open to Lush J. to take the view that the real cause of the disaster was the meddling with a motor car by a man who had no more than an elementary knowledge of its construction and did not recognize that in the circumstances not the best but the only thing to do was to turn off the tap. Whether the damage was caused by Coumis's negligence, for which the defendant is responsible, or by the defendant's own negligence in employing a man with so little knowledge, in either case the judgment must stand and the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. On the first point I should like to add that the principle of *Rylands* v. *Fletcher* (1) is further stated by Park J. in *Vaughan* v. *Menlove* (2) in these words: "In *Tubervil* v. *Stamp* (3), which was 'an action on the case upon the custom of the realm' quare negligenter custodivit ignem suum in clauso suo, ita quod per flammas blada Quer. in quodam clauso ipsius Quer. combusta fuerunt; after verdict pro Quer. it was objected that the custom extended only to fire in his house, or curtilage (like goods of guests) which were in his power: Non alloc. For the fire in his field was his fire as well as that in his house; he made it, and must see that it did no harm, and must answer the damage if he did. Every man must use his own so as not to hurt another; but if a sudden storm had arisen which he could not stop, it was matter of evidence, and he should have shewn it. . . . ." If this motor car with the petrol in its tank was potentially dangerous, such as a man's own fire, then it was the defendant's duty to see that the potential danger did not become an actual danger causing damage to his neighbour. The Act of Geo. 3 is no protection against that liability.

Then what is the fire referred to in s. 86 of that Act? When did that fire begin, and did it accidentally begin? To state the facts shortly, the chauffeur turned the starting handle of the car after having admitted petrol into the carburettor by using the pressure pump. Unfortunately ignition, instead

(1) L. R. 3 H. L. 330. (2) 3 Bing. N. C. 468, 476.
(3) (1698) 1 Salk. 13.

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of confining itself to the cylinder, extended to the petrol in the carburettor. So far no great harm was done. There was but little petrol in the carburettor and there were ready means of preventing any further flow. If the chauffeur had resorted to those means the fire would have burnt itself out without doing any harm. But, as the result of not turning off the petrol tap, the carburettor was being constantly supplied with petrol and the fire was constantly increasing in volume and intensity till the man could not reach the tap without burning his hand, and in the end the car and the garage were involved in a conflagration. Now what is the fire to which the Act refers? Obviously that fire which, but for the section, exposes to an action the person on whose premises it originates; in other words the fire which causes the damage for which the action lies. It cannot intend a fire in a domestic hearth. Such a fire is innocuous so long as it remains there; but if a live coal falls upon the floor and there comes in contact with inflammable material and sets it on fire and so causes damage, then it becomes a fire within the intention of the Act. In the present case what was the fire which caused the damage? Not the fire in the carburettor while it was harmless and might have been stopped, but that which caught the inflammable parts of the car and then the garage. When did that fire begin? Not when the petrol caught fire in the carburettor but when that fire assumed such proportions that it enveloped the inflammable portions of the car. Did that fire begin accidentally? No; the learned judge has found that Coumis was negligent in not preventing the outbreak of that fire. He could have prevented it by stopping the further flow of petrol vapour into the carburettor. If he had so done there would have been no fire. As it was, the fire began not accidentally, but by the negligence of Coumis.

DUKE L.J. I agree. I do not see how this case can be taken out of the principle of *Rylands* v. *Fletcher* (1), which was thus stated by Lord Cairns L.C. in the very words of Blackburn J. (2): "The true rule of law is, that the person

(1) L. R. 3 H. L. 330. (2) L. R. 3 H. L. 339.

who, for his own purposes, brings on his land and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril." He can excuse himself by showing that the escape was owing to the plaintiff's default or perhaps that it was the consequence of vis major or the act of God. In the present case there was petrol which was easily convertible into an inflammable vapour; there was the apparatus for producing a spark; and added to those there was a person supposed to control the combustion but inexperienced and unequal to the task. Taking together the presence of the petrol, and the production of the inflammable gas, or those combustibles together with the inexperience of the person placed in charge of them, it is impossible to say that this is not an instance of the principle laid down by Blackburn J. That was no new principle. It is summed up in the maxim usually expressed in Latin, but found in *Filliter* v. *Phippard* (1) and *Vaughan* v. *Menlove* (2), that a man must so use his own property that he does not hurt the property of his neighbour.

That would dispose of this case but for the defendant's contention that he is excused by s. 86 of the Fires Prevention (Metropolis) Act, 1774. In my opinion the terms of that enactment fall far short of showing a definite intention to relieve a defendant in such a case as this. The actions against which the statute gives protection are in respect of fires which shall accidentally begin. I have the greatest doubt whether this fire began accidentally at any stage. If it was all one fire, it was begun not accidentally but intentionally. If progressive stages may be regarded it was not a fire which began accidentally without negligence at the stage when it became a conflagration involving goods and premises. The question may some day be discussed whether a fire, spreading from a domestic hearth, accidentally begins within the meaning of the Act, if such a fire should extend so as to involve the destruction of property or premises. I do not covet the task of the advocate who has to contend that it does. In the present case the fire, so far as it was a means of mischief, resulted from the negligent omission to turn off the petrol

(1) 11 Q. B. 347. (2) 3 Bing. N. C. 468.

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tap, an act which would have stopped the flow of petrol. All the witnesses who had any experience of such matters drew a distinction between fire in a carburettor, where the vapour can be instantly cut off, and such a fire as occurred in this case. The learned judge has found that this fire was due to negligence. I cannot disagree with him. Whatever may be the effect of the Act of Geo. 3 upon the nice questions that have been discussed, this case is outside any possible protection of that statute.

Appeal dismissed.

Solicitor for appellant: *Howard Lawrance.*
Solicitors for respondent: *E. O'Connor & Co.*

W. H. G.

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KING-HALL AND ANOTHER *v.* STANDARD BANK OF SOUTH AFRICA, LIMITED.

[1917 K. 651.]

Navy—Ship—Carriage of Treasure—Freight—Claim by Officer—Contract—Custom—Freight for Treasure Act, 1819 (59 *Geo.* 3, *c.* 25)—*Order in Council, August* 1, 1888—*Order in Council, October* 26, 1914.

The Act 59 Geo. 3, c. 25, has made illegal the payment of freight for the conveyance of gold, silver, jewels and other articles therein referred to in any ship of the royal navy either by the custom of the navy which still existed at the time of the passing of the Act or under any contract except in so far as the payment is ordered and directed by a Proclamation or Order in Council issued under the Act.

It follows that, since the issuing of the Order in Council of October 26, 1914, which annulled the only then existing Order in Council making provision for the payment of freight of that description without itself making any corresponding provision, the payment of such freight is illegal and cannot be enforced.

ACTION in the Commercial List tried before Bailhache J.

The following statement as to the history of the law and custom relating to the present action and to the circumstances in which the action arose is taken substantially from the judgment of Bailhache J.

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In olden times when the seas were not so safe as they were before the present war and when pirates and rovers abounded it was the practice for merchants who required to transport bullion or articles of great value by sea to do so by shipping those articles on board King's ships, the remuneration to be paid being a matter of bargain between the merchant and the officer in charge of the ship, who used often to make considerable sums in that way. The remuneration so paid was called, and is called throughout this case, freight. This practice, however, led to great abuses. Sometimes the captain of a King's ship in order to earn this freight would leave his station without orders or permission and carry the cargo to its destination. Although he was liable to penalties for so doing, yet the profit he could make was often a sufficient inducement to him to disregard his orders. Towards the end of the eighteenth century this practice was declared to be illegal as being contrary to public policy. It nevertheless continued though in a modified form until the year 1819. In that year the Act 59 Geo. 3, c. 25, was passed, which had the twofold object of putting an end to these private bargains and of regulating the traffic. The Act is entitled "An Act to enable His Majesty to fix the rate and direct the disposal of freight money, for the conveyance of specie and jewels on board His Majesty's ships and vessels," and the body of the Act which is all in one section is as follows: "Whereas it is expedient that His Majesty should be authorised to fix the rate and direct the disposal and distribution of freight money for the conveyance of specie and jewels on board His Majesty's ships and vessels; Be it therefore enacted . . . . that from and after the passing of this Act all freight money to be paid for the conveyance in any of the ships and vessels of His Majesty, his heirs and successors, of gold, silver and jewels, or of any other article which may be by special order received on board the said ships and vessels, and for which freight shall be payable, shall be paid at such rate, and distributed and applied to such purposes, and divided to and amongst such persons in such proportions and after such manner as His Majesty,

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his heirs or successors, shall from time to time think fit to order and direct, by any Proclamation or Proclamations to be issued for that purpose; and that no freight money or reward shall hereafter be demanded, paid, received or retained, by, to or for the use or on account of any person or persons, for the conveyance on board of any of the ships or vessels of His Majesty, his heirs or successors, of any gold, silver or jewels, or any other article, which may be by special order received on board the said ship or vessel, and for which freight shall be payable, other than for the purposes and by the person or persons, in the proportion, at the rates, and in the manner so to be paid and allowed by Proclamation or Proclamations; and that all bargains, contracts, covenants and agreements, made or entered into, or hereafter to be made or entered into, for the payment of any freight money for or in the name or on the account of freight for the conveyance of gold, silver or jewels, or other articles as aforesaid, on board of any of His Majesty's ships or vessels, at any other rate, or for any other purpose, or by or to any other person or persons, or in any other manner or proportions than as aforesaid, shall be and the same are hereby declared to be utterly void."

Proclamations and Orders in Council were made from time to time under that Act. On August 10, 1888, an Order in Council was made which revoked the Proclamations and Orders in Council then in force, and provided that the rate at which freight should be paid for the conveyance on board any of Her Majesty's, ships of treasure belonging to parties other than the Crown, whether gold, silver, jewels or other articles which might by Special Order be received on board any of such ships should be 1 per cent. on the value of the articles, and that that 1 per cent. should be divided as follows: one-fourth to the flag officer, if any, or flag officers on the station or in the squadron to which the ship receiving the treasure on board might belong, two-fourths to the captain or officer commanding the ship, and the remaining one-fourth to Greenwich Hospital. That Order in Council further provided that in order to entitle a flag officer to share in the

freight it was necessary that he should sign and hand to each of the captains of ships serving under him a declaration in a form therein set out.

On October 17, 1914, the Lords Commissioners of the Admiralty presented a Memorial in which, after reciting the last-mentioned Order in Council, and that they "consider it desirable that the system of payment for the conveyance of treasure in Your Majesty's ships therein prescribed should be terminated," they went on to say "We beg leave humbly to recommend that Your Majesty may be graciously pleased by your Order in Council to annul the aforesaid Order in Council of the 10th day of August, 1888, and the Proclamation annexed thereto." On October 26, 1914, an Order in Council was made which, after reciting that Memorial, went on to provide that, "His Majesty, having taken the said Memorial into consideration, was pleased by and with the advice of the Privy Council to approve of what is therein proposed."

The events which more immediately concern the present action may be shortly stated: The mining companies in South Africa were in the habit of sending their bullion down to the various banks at Cape Town for safe custody. The banks put the bullion into their vaults, as they would have put any other valuables, but they did not charge for its safe custody. The bullion thus placed in their vaults was sold to the Bank of England. The Bank of England paid for the bullion 97 per cent. of its value as assayed in Cape Town, reserving to themselves the remaining 3 per cent., which they did not pay until the bullion arrived in this country. That 3 per cent. was apparently kept in hand in order to allow a margin for any variations in the assay that might show themselves when the gold was tested and tried on arrival in this country. The mining companies had to pay all the incidental expenses such as freight and insurance. The property in the bullion was in the Bank of England.

At the end of 1914 and the beginning of 1915 it was determined to transport a certain quantity of this bullion from Cape Town to this country. The total quantity to be

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transported was 8,000,000*l.* worth. Of that total quantity 2,500,000*l.* worth was to be transported from the vaults of the Standard Bank of South Africa, Ld.

At that time Rear-Admiral Sir Herbert Goodenough King-Hall was Commander-in-Chief of His Majesty's ships on the Cape of Good Hope Station, and he had duly signed the declaration required by the Order in Council of August 10, 1888. He had instructions to receive from the Standard Bank of South Africa, Ld., this bullion, to place it on board *H.M.S. Albion*, and to send it forward to this country. He thereupon wrote to the manager of that bank a letter dated January 1, 1915, in these terms: "I am informed by His Excellency the Governor-General that you have received instructions from the Union Government to hand over on demand to my order sealed boxes containing merchandise gold deposited with you on behalf of the Bank of England, of approximately, but not exceeding, the following value—2,530,000*l.* I request, therefore, that you will hand over these boxes to Captain E. H. Harding, Prince Alfred's Guards, who is acting under the instructions of Major-General Thompson, C.B., D.S.O., with whom arrangements have been made for their safe transfer to my custody." The Standard Bank was to hand over the bullion to Captain Harding, who was to take it from the bank to Simons Town, the port of Cape Town, where it was to be placed on board the *Albion* under an armed guard. The reason for these precautions was that it was obviously a dangerous matter, particularly at that time, to take the bullion out of the vaults of the bank, transfer it to the harbour, and put it on board *H.M.S. Albion*. These directions were in fact duly complied with; about January 9, 1915, the gold was handed over, the officer gave a receipt to the bank for the gold, and *H.M.S. Albion* sailed. She sailed under the command of an officer who was then Captain Heneage, but afterwards became Rear-Admiral Heneage. That ship called at St. Helena and Gibraltar, where part of the bullion was transhipped and carried to this country on other of His Majesty's ships. In respect of the conveyance of the bullion the mining companies paid 9000*l.*,

which was said to have been received by the Admiralty, and to have covered freight and insurance, but it did not appear that any insurance was ever effected.

Between January 1 and March 18, 1915, correspondence relating to the shipment of the bullion passed between the office of the Standard Bank at Cape Town and their office in London, and between the latter office and the Bank of England, and this was relied upon on behalf of the Standard Bank as showing that the bullion belonged to the Bank of England and that the Standard Bank in arranging for its conveyance to England were merely acting as agents for the Bank of England.

On November 23, 1917, Rear-Admiral King-Hall, as the Commander-in-Chief on the Cape of Good Hope Station, hereinafter called "the first plaintiff," brought the present action against the Standard Bank of South Africa, Ld., Rear-Admiral Algernon Walter Heneage, hereinafter called "the second plaintiff," who had been the captain of *H.M.S. Albion* at the time when the bullion was shipped, being afterwards added as a co-plaintiff, the claim of the plaintiffs and each of them being for (*a*) a declaration that the plaintiffs and each of them were entitled jointly or severally or in the alternative to recover freight from the defendants in respect of the carriage of the bullion on *H.M.S. Albion* at the rate of 3 per cent. or at a rate and in proportions to be fixed in accordance with the Act 59 Geo. 3, c. 25; (*b*) an order for payment by the defendants of freight in accordance with that declaration, or alternatively sum or sums as damages.

The plaintiffs in their points of claim alleged in substance that on or about January 10, 1915, the first plaintiff as Commander-in-Chief as aforesaid and acting upon the instructions of the Admiralty, and the second plaintiff as captain of *H.M.S. Albion* received at the Cape from the defendants on that ship the bullion in question for conveyance on behalf of the defendants from the Cape to England, and that the voyage was duly completed after transhipment of the bullion at St. Helena and Gibraltar and the bullion arrived safely in England; that by the receipt of the bullion by each of the

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plaintiffs respectively from the defendants on that ship for carriage to England there was a contract between each of the plaintiffs respectively and the defendants that each of the plaintiffs respectively should carry the bullion to England for reward payable by the defendants, and each of the plaintiffs was entitled to be paid freight by the defendants in respect of the carriage and due delivery of the bullion at a reasonable rate or at a rate to be fixed in accordance with the statute 59 Geo. 3, c. 25, that in the alternative each of the plaintiffs in support of his claim to freight would rely on that statute, and that a reasonable rate of freight was 3 per cent.; that further or in the alternative by the custom or usage of His Majesty's Navy, a flag officer and/or a captain were entitled to freight as reward for the carriage of bullion by his orders on vessels under his command, and that the carriage of bullion on *H.M.S. Albion* as aforesaid was subject to that custom and usage, and each of the plaintiffs by the custom and usage was entitled to recover freight from the defendants; and that in breach of each of the said contracts and of the custom and usage, and wrongfully, the defendants had not paid and refused to pay freight to either of the plaintiffs for the carriage of the bullion whereby each of the plaintiffs had suffered damage—namely, the amount of the said freight.

The defendants in their points of defence said, inter alia, that the bullion was not shipped by them or on their behalf or received from them by either of the plaintiffs for shipment as alleged or at all, that the bullion was the property of the Bank of England, and that save as custodians thereof and as agents for the Bank of England the defendants had at no time any interest in or concern with the bullion; that the bullion was, in accordance with written instructions from the first plaintiff dated January 1, handed over by the defendants to his order at Cape Town on or about January 9, 1915; that the defendants had no concern with the shipment of the bullion and the same was not shipped by them or at their request, and, alternatively, that in handing over the bullion the defendants were acting as agents only for the Bank of England; that the defendants denied that there was

any contract between the defendants and the plaintiffs or either of them for the shipment or carriage of the bullion or for payment of freight by the defendants to the plaintiffs or either of them and that by the provisions of 59 Geo. 3, c. 25, the contract (if any) was void by reason of the fact that at the date of the shipment of the bullion there was no Proclamation in force under the statute ordering or directing the payment, distribution or application of freight money for the conveyance of specie on board His Majesty's ships; that the defendants denied the alleged custom or usage of His Majesty's navy, and that if that custom or usage ever prevailed it was abrogated by and ceased to prevail after the statute 59 Geo. 3, c. 25, that the custom or usage (if any) did not purport to and did not bind shippers of specie to pay freight for its conveyance and was applicable only to the officers of His Majesty's navy concerned in the shipment or conveyance of specie, and further that the custom or usage was bad for uncertainty as to the rate of freight payable; that in any event the bullion was not carried to England in *H.M.S. Albion*, that it was without authority from the defendants transhipped at St. Helena and Gibraltar into two other ships by which it was brought to England, that neither of these ships was employed on the Cape Station nor commanded by either of the plaintiffs, and that therefore the contract (if any) by the plaintiffs was not performed by them or either of them and that the plaintiffs were not nor was either of them entitled to freight for the carriage of the bullion to England; that having regard to the statute 59 Geo. 3, c. 25, the Court had no jurisdiction to grant to the plaintiffs any of the relief claimed by them; that the points of claim disclosed no cause of action; and that it was not admitted that 3 per cent. was a reasonable rate of freight.

On behalf of the plaintiffs reference was made to the reports of the cases cited in argument (see infra) for evidence of the existence, before the passing of the Act of 1819, of the alleged custom according to which officers of the Royal Navy were paid freight for the conveyance of treasure on ships under their command, and the books of an old firm of naval agents

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in London were produced in order to show that the practice still continued in the years 1855 to 1857.

Further, on behalf of the plaintiffs the evidence of the first plaintiff taken on commission was read, which was to the effect that he understood that the gold was received from the defendants, for conveyance on their behalf, but that he could not say so with certainty; and evidence was given by the second plaintiff that he gave the defendants a receipt for the gold, and that he went to their bank at Cape Town to confer about its removal.

On behalf of the defendants evidence was given by their assistant manager in London, who stated that the gold was brought to England for the Bank of England, that the defendants merely acted as gratuitous depositories of the gold for the mining companies, that a cheque for 9000*l.* which was sent by the defendants to the Admiralty in respect of freight was sent at the request of the Bank of England and that after adjustment of accounts the defendants paid no freight out of their own pockets.

Captain Maxwell Anderson R.N. and *Le Quesne* for the plaintiffs.

The plaintiffs having received the bullion on board a ship under their command for conveyance and having conveyed it on behalf of the defendants are entitled by custom to freight from the defendants for the conveyance of the bullion. From early times a custom has existed in the Royal Navy according to which flag officers and captains are entitled to freight for the conveyance of treasure and other articles in ships under their command. The custom was no doubt liable to the abuse that officers sometimes left their stations without orders in the hope of earning such freight, and towards the end of the eighteenth century the question of its validity was raised. Early in last century that question was discussed in several cases. In *Montagu* v. *Janverin* (1) it was held that a flag officer could not recover from the captain of the ship in which bullion had been carried a share of the freight

(1) (1811) 3 Taunt. 442.

which had been paid to the latter, Sir James Mansfield C.J. there expressing the view that such a custom could not exist in law; and in *Brisbane* v. *Dacres* (1) it was held that the captain of a King's ship who had received freight for the carriage of bullion could not recover back from the flag officer a proportion of the freight which he had paid to the latter on the ground that the transaction was illegal. On the other hand in *Hodgson* v. *Fullarton* (2) and *Hatchwell* v. *Cooke* (3) it was held that the commander of a ship of war who had agreed to carry the bullion of a merchant for freight was bound to keep and deliver it safely, and in the latter of these cases Gibbs C.J. expressly stated that he would not pronounce that the transaction was illegal. No case can be discovered in which an officer conveying treasure for a merchant has had to sue the latter for freight, and it would thus seem that the custom has been universally acquiesced in by merchants. The Act of 1819, 59 Geo. 3, c. 25, recognizes that the custom existed at the time when the Act was passed. The Act does not either expressly or by implication abrogate the custom, but merely provides that the rate of the freight shall be regulated by Proclamation or Order in Council. The Order in Council of August 10, 1888, annulled the previous Proclamations and Orders in Council that had been made under the Act, and directed that the rate of freight should be 1 per cent., to be divided as therein mentioned. The Order in Council of October 26, 1914, after reciting that it was considered desirable that the "system of payment" for the conveyance of treasure prescribed in the Order of 1888 should be terminated, annulled that Order but did not itself introduce any new rate of freight. The words "system of freight" in the recital of that Order show that what is dealt with by the Orders in Council under the Act is not the custom of conveying treasure for payment of freight, but merely the system of payment of freight. The result of the Act and Orders in Council is that the custom of carrying treasure on ships of war continues to exist as it always has existed,

(1) (1813) 5 Taunt. 143. (2) (1813) 4 Taunt. 787.
(3) (1816) 6 Taunt. 577.

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but that there is at present no Order in Council fixing the rate of freight to be paid. Sect. 32 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), which provided for the punishment of officers receiving on board their ships goods and merchandize, except in certain special cases, was not sufficient to put a stop to the practice in question. In these circumstances the plaintiffs are entitled to freight at a reasonable rate, which, having regard to the usages of the past and the special risks which the plaintiffs incurred owing to the war, should be 3 per cent., or to freight at a rate to be fixed in accordance with the Act.

Secondly, the plaintiffs, having received the bullion on board a ship under their command and conveyed it on behalf of the defendants, are entitled to freight from the defendants by virtue of an implied contract that they should convey the bullion for payment of freight by the defendants. That contract was not void under the Act of 1819. The Act does not avoid all contracts for the payment of freight in consideration of the conveyance of treasure on warships, but only those contracts which stipulate for payment of freight otherwise than as provided by any Order in Council made under the Act. At the time when the contract in question was made there was no Order in Council in force under the Act, and the contract could not therefore conflict with the provisions of any such Order. The evidence does not show that the defendants had no interest or concern in the bullion except as mere custodians or gratuitous bailees, or that in handing it over to the plaintiffs and contracting for its conveyance they were acting only as agents for other parties.

Leslie Scott K.C. (*Raeburn* with him) for the defendants. The plaintiffs are not entitled by custom to the freight which they claim. The alleged custom of the Royal Navy according to which officers are entitled to freight for the conveyance of bullion and other articles in ships under their command has not been proved. If the custom ever existed, it was abrogated by the Act 59 Geo. 3, c. 25.

Secondly, the plaintiffs are not entitled to the freight by

any contract. A contract of affreightment by which a naval officer undertakes in consideration of freight to convey treasure or other goods in a ship under his command has always been regarded as illegal on the ground that it is against public policy as placing the officer in a position in which his interest may conflict with his duty. From the cases that have been cited that appears to have been the view of the better authorities in the beginning of last century. The Act 59 Geo. 3, c. 25, which was passed soon afterwards, provides that all contracts for the payment of such freight " by or to any other person . . . . than " as authorized by a Proclamation under the Act are declared to be void. By virtue of the Act therefore a contract of the kind in question is clearly avoided unless it happens to be expressly authorized by a Proclamation or Order in Council made under the Act at the discretion of the Government. The Order in Council of October 26, 1914, annulled the only then existing Order in Council providing for payment of freight without introducing any fresh provision for that purpose. At the date when the alleged contract was made there was thus no Order in Council sanctioning the making of any contract for the payment of freight, and any such contract was therefore avoided by the Act.

Further, there was not in fact any contract express or implied between the parties. There is no evidence to show that they ever entered into any contract of affreightment. The evidence shows that the bullion was not the property of the defendants, but of the Bank of England, that the defendants had no concern or interest in it except as custodians or gratuitous bailees, that in handing it over to the plaintiffs and arranging for its conveyance they were acting only as agents, and that the sum which was paid in order to cover the freight was not paid by the defendants.

BAILHACHE J. This is an action of a very unusual and most interesting character. [His Lordship, having summarized the history of the law relating to the case and stated the facts, continued :] In these circumstances the first plaintiff, who was the Admiral-in-Charge of the Cape of Good Hope Station,

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and the second plaintiff, who was the captain of *H.M.S. Albion*, claim that they are entitled to be paid freight in respect of the carriage of the bullion.

The plaintiffs base their claim first upon the alleged ancient practice and custom of His Majesty's navy, according to which an officer is entitled to freight for the carriage of treasure by his orders in vessels under his command. I think it has been proved that that custom did formerly exist. It is to be noticed, however, that the custom was in certain respects held to be illegal as long ago as the end of the eighteenth century. Moreover, it must be borne in mind that the custom so far as it still continued to exist was in effect abrogated by the Act of 1819, 59 Geo. 3, c. 25, by which the whole matter of the transport of bullion on King's ships is now regulated. In dealing with the rights of the plaintiffs in the present case I think that it is unnecessary to go further back than that Act.

The Act of 1819 may be regarded as consisting of three parts. The first part provides that all freight for the conveyance of gold, silver and other articles of value shall be paid and divided as shall from time to time be ordered by Proclamation; the second part provides that no freight for such conveyance shall thereafter be paid other than as allowed by Proclamation; and the third part provides that all future bargains for payment of freight for such conveyance otherwise than as aforesaid shall be void. The Act provides for the regulation of these matters by Proclamation or Order in Council and in no other way.

Under that Act Proclamations and Orders in Council were made from time to time. The earlier of these were revoked by the Order in Council of August 10, 1888. If that Order in Council had been in force when this bullion was received on board *H.M.S. Albion*, it cannot be doubted, subject to the questions of transhipment and of the apportionment and division of the money, that the plaintiffs would have been entitled to receive their proportions of 1 per cent. on the value of this bullion. Of that percentage one-fourth would have gone to the first plaintiff, two-fourths

to the second plaintiff, and the remaining one-fourth to Greenwich Hospital; and in consequence of the great value of the bullion each of these shares would have amounted to a very large sum of money. Before the bullion was received on board *H.M.S. Albion* there had, however, been made the Order in Council of October 26, 1914, which annulled the Order in Council of August 10, 1888, without itself making any provision as to the rate of freight to be paid for the conveyance of these articles. The reason why the Order in Council of 1888 was annulled by the Order of 1914 is obvious. After the war began it became necessary from time to time to transport very large amounts of bullion from overseas to this country, and the rate of freight under the former of these Orders—namely, 1 per cent. on the value of the articles carried—became impracticable. At the particular time with which we are dealing, for example, the total amount of bullion transported from South Africa to this country was 8,000,000*l.* On that sum 1 per cent. amounts to 80,000*l.*, which would be a sum far too large to be allocated to the persons mentioned in that Order.

However that may be, the effect of the Order in Council of October, 1914, was that at the time when this bullion was received on board *H.M.S. Albion* there was no Order in Council under the Act directing or authorizing the payment of freight for the carriage of such articles, or regulating the amount which either the flag officer or the captain of the transporting ship is to receive. There being no such Order in Council, it would seem that I have no power to determine whether any payment of freight ought to be made, and certainly no means of determining what rate of payment ought to be made. I have no authority to make an Order in Council or to supply the deficiency of there being no Order, nor have I authority to direct that an Order be made. In the absence of an Order in Council providing for payment of the freight in question, I must come to the conclusion that a necessary element in the plaintiffs' case is missing, and that they cannot succeed in their claim.

Having regard to the recital of the Order in Council of

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Bailhache J.

October 26, 1914, I am disposed to agree with counsel for the plaintiffs in thinking that it was intended that that Order should deal with the "system of payment" for the conveyance of treasure and other articles in His Majesty's ships. At the time when that Order was made it would seem that it was in contemplation not only that the Order of 1888 should be annulled and the then existing system of payment set aside, but also that some fresh Order in Council should be promulgated dealing with the system of payment and fixing the remuneration that was to be paid to the flag officer and to the captains of His Majesty's ships transporting cargo of this kind. Unfortunately for the plaintiffs that intention was not carried out; and, as I have already said, in the absence of the necessary Order in Council, their claim cannot be sustained.

It appears that the transport of the bullion to this country caused some little trouble and confusion; and it is interesting to notice that one result of the trouble and confusion was that this large quantity of bullion was sent from Cape Town to this country uninsured. Fortunately the bullion duly arrived. In respect of the carriage the mining companies have paid over 9000*l.*, which is said to cover freight and insurance. How much of that sum was allocated to an insurance which did not exist I do not know. That sum has apparently been received by the Admiralty, and I should suppose that it was the intention of the Lords of the Admiralty to endeavour to obtain an Order in Council dealing with the allocation of that money, but no such Order has as yet been made.

There is another difficulty in the way of the plaintiffs. It is said on behalf of the defendants that the plaintiffs have sued the wrong defendants. It is said that the present defendants had nothing to do with the transport of the bullion, that they were merely agents acting under instructions, and that in no circumstances could they be liable for the freight. Moreover, it was alleged that they were bailees, and further that they were gratuitous bailees, though I am not sure about that, since it might have suited them for

business reasons to accept and take care of this bullion because it came from their customers. Assuming, however, that they were gratuitous bailees, I am not certain in the circumstances of this case that they might not, if freight had been payable, have been liable for it. They were the persons with whom the shipment was arranged, and from whom the bullion came. It is not, however, necessary for me to decide that point. I merely refer to it as I am not satisfied that if freight was due, it would not have been due from the present defendants.

The reason for my decision is that there is no Order in Council authorizing the payment of this freight, and that such an Order is absolutely necessary to support a claim to the freight.

There will be judgment for the defendants with costs.

Solicitors for plaintiffs: *Botterell & Roche.*

Solicitors for defendants: *Thompsons, Quarrell & Jones.*

J. R.

[IN THE COURT OF APPEAL.]

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March 18, 19.

ECCLESIASTICAL COMMISSIONERS FOR ENGLAND, APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Reversion Duty—Total Value of Land—Building Lease—Computation of Total Value at Grant of Lease—Finance (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 13, *sub-ss.* 1, 2; *s.* 25, *sub-ss.* 1, 3; *s.* 41.

By s. 13, sub-s. 1, of the Finance (1909-10) Act, 1910, "On the determination of any lease of land there shall be charged, levied and paid, subject to the provisions of this part of this Act, on the value of the benefit accruing to the lessor by reason of the determination of the lease a duty, called reversion duty, at the rate of one pound for every complete ten pounds of that value."

By sub-s. 2, "For the purposes of this section the value of the benefit accruing to the lessor shall be deemed to be the amount (if any) by which the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation) of the land at the time the lease determines, ... exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease . . . ."

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By s. 25, sub-s. 1, "For the purposes of this part of this Act, the gross value of land means the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes) might be expected to realise."

Sub-s. 3: "The total value of the land means the gross value after deducting the amount by which the gross value would be diminished if the land were sold subject to any fixed charges. . . ."

By s. 41 the expression "lease" includes an agreement for a lease:—

Held, that where an agreement to grant a lease has been made in consideration of a rent and the expenditure of a certain sum in the erection of buildings "the total value of the land at the time of the original grant of the lease" is the market value at the time of the fee simple in possession, not subject to any lease, ascertained on the basis of the rent reserved and the payments made in consideration of the lease.

Decision of Lush J. [1918] 2 K. B. 602 reversed.

APPEAL by the Ecclesiastical Commissioners for England against the decision of Lush J. (1) affirming the decision of a referee under the Finance (1909–10) Act, 1910, upon an appeal against an assessment of reversion duty by the Inland Revenue Commissioners.

The appellants were the owners of the freehold of the hereditament assessed, No. 26, Strutton Ground, in the city of Westminster.

On March 27, 1916, the respondents served notice of assessment and notice to pay reversion duty as follows:—

	£	*s.*	*d.*
Total value at the determination of the lease	2400	0	0
Total value at grant of lease (on basis of rent reserved and payments made) ..	1022	0	0
Value of benefit accruing to lessor ..	1378	0	0
Full duty	137	0	0
Reduced amount payable	7	7	11

On June 28, 1907, an agreement in writing was entered into between the appellants and the firm of Barlow & Roberts. By this agreement it was provided that the appellants should, on receipt of a certificate from their surveyors that the buildings agreed to be erected had been erected to their satisfaction, subject to the stipulations of the agreement, grant to Barlow & Roberts the lease or leases of a piece of

(1) [1918] 2 K. B. 602.

land then forming the site of messuages known as Nos. 22, 24, 26, and 28, Strutton Ground, in the city of Westminster, and of the buildings agreed to be erected thereon, for the term of eighty years from June 24, 1907, at the rent of 40*l.* for the first year and 160*l.* for every subsequent year of the term. Barlow & Roberts agreed forthwith, to the satisfaction of the said surveyors, to remove the said messuages and thereafter to erect the said buildings and to expend thereon a sum of not less than 3000*l.* It was further expressly provided that nothing contained in the building agreement should operate as an actual demise of the said piece of land and premises to Barlow & Roberts, or to give or vest in them any term of years in the said premises. A form of lease was referred to in the building agreement as the form to be adopted on the grant of the intended leases.

Shortly after the making of the building agreement Barlow & Roberts, who carried on the business of builders, themselves removed the existing messuages and erected the prescribed buildings to the satisfaction of the appellants' surveyors, who duly granted the necessary certificates in that behalf. The amount expended in the erection of the premises known as No. 26, Strutton Ground, was 900*l.* The builders' reasonable profit thereon had been agreed at 150*l.*

The appellants thereafter granted to Barlow & Roberts four several leases, whereof the one material to the present case was a lease, dated December 19, 1907, of No. 26, Strutton Ground, for a term of eighty years, commencing on June 24, 1907, at a rent of 10*l.* for the first year of the term and thereafter at a yearly rent of 40*l.* This lease was in the form prescribed by the building agreement.

By an underlease dated January 2, 1908, Barlow & Roberts sub-demised No. 26, Strutton Ground, to Mr. John Hayes for a term of twenty-one years, determinable at the end of the seventh or fourteenth year, at the yearly rent of 130*l.* The underlease was subsequently surrendered to a mesne assign of the term created by the lease.

By an indenture dated February 1, 1913, Dr. Kelly, who by divers mesne assignments had become the assignee of the

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term created by the lease, surrendered the same to the appellants, together with certain other premises, in consideration of an agreement by the appellants to grant him a new lease in respect of the premises.

It was on the surrender of the lease that the occasion arose on which reversion duty was claimed.

On the receipt of the notice of assessment and notice to pay duty the appellants gave notice of their intention to appeal to the referee against the assessment. The particulars of the grounds of appeal were—that the figure of 1022*l.* in the notice of assessment did not represent the total value of the premises at the time of the original grant of the lease; that such total value should be the total value as defined by s. 25 of the Finance (1909–10) Act, 1910, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease, as provided by s. 13, sub-s. 2, of the Act; and that upon the basis of 40*l.* rent reserved and 900*l.* payment made the total value of the premises at the time of the original grant of the lease should be 2200*l.*

The appeal was heard by the referee on May 9, 1916, and all the above facts were proved or admitted before him.

Evidence was given for the appellants by Mr. B. M. Johnson, a member of the firm of Messrs. Clutton, surveyors and agents to the appellants, as to the method of arriving at the total value of the piece of land No. 26, Strutton Ground, at the time of the original grant of the lease on the basis of the rent reserved and the payments made in consideration of the lease. The following table was put in and proved by him :—

Rent reserved		£40 per annum.
Payments made :		
Cost to builder of erection of buildings	£900	
Builder's reasonable profit ..	150	
Normal cost to lessee	£1050	
Reasonable rate of interest which lessee would expect on such a property in this position, 8 per cent... ..		£84

Annual value which lessee would expect at eighteen years' purchase	£124 per annum.
Total value at grant	£2232
Total value at termination (as agreed)	£2400
Total value at grant (as above) ..	2232
Difference	£168

His evidence was corroborated by the evidence of Mr. L. R. Vigers, who confirmed Mr. Johnson's method and conclusions.

Evidence was given for the respondents by Mr. R. A. Dash to the effect that in his opinion total value meant market value at the time of the original grant of the lease, meaning market value of the lessor's interest, and that the method to be adopted in ascertaining the total value of the land at the time of the original grant of the lease was to take the rent reserved, multiply it by twenty-five years' purchase, and add the cost of building, including builder's reasonable profit, deferred eighty years on the 5 per cent. table.

On May 26, 1916, the referee gave the following decision :—

"This appeal is against the assessment of premises known as No. 26, Strutton Ground, Westminster, to reversion duty. The total value at the determination of the lease has been agreed at 2400*l.* The total value at the grant of the lease on the basis of the rent reserved and payments made has been assessed at 1022*l.*; and the appellants appeal against this assessment, which they say should be 2232*l.* The land which is the subject of the appeal was let with other sites adjoining on a building agreement for a lease by the Ecclesiastical Commissioners on June 28, 1907, for the erection of a shop and dwelling-house, on which 750*l.* was to be spent by the lessee, subject to a ground rent of 40*l.* a year.

"The building was erected, and the lease for eighty years from June 24, 1907, was granted on December 19, 1907.

"It is agreed that the builder actually spent 900*l.* on the building, and that his reasonable profit on that expenditure was 150*l.*, making the total expenditure on the building

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1050*l*. The lessee underlet the premises at a rent of 130*l*. a year for twenty-one years on January 2, 1908, and surrendered the lease on February 1, 1913, the surrender taking effect as from December 25, 1912, and being the occasion of the assessment appealed against. By sub-s. 1 of s. 13 of the Act it is provided that reversion duty is to be levied on the value of the benefit accruing to the lessor by reason of the determination of the lease, and by sub-s. 2 of s. 13, that the value of the benefit so accruing shall be deemed to be the amount by which the total value (as defined for the purpose of the general provisions of this part of the Act relating to valuation) of the land at the time the lease determines (subject to deductions which are not required to be made in this case) exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease.

"It was argued for the appellants that the sub-section does not make any distinction between the meaning of total value at the grant of the lease and the meaning of total value at its determination," and it was contended that the valuation should be in accordance with the table put in by Mr. Johnson and set out above.

"It was argued on behalf of the commissioners (respondents) that the sub-section does make a distinction between the meaning of total value at the original grant and of total value at the determination of the lease, and that the valuation should be as follows:—

Agreed total value at determination of lease ..			£2400
Total value at original grant of lease:			
Rent reserved	£40		
Years' purchase	25		
		£1000	
Payments made:			
Cost of building, including reasonable profit ..	£1050		
Deferred 80 years on 5 per cent. table ..		£22	£1022
Benefit			£1378

"I am of opinion that the sub-section does make a distinction between the meaning of total value at the original grant and of total value at the determination of the lease.

"As the sub-section specially provides that the total value at the termination of the lease shall be as defined for the purpose of the general provisions of this part of the Act, it appears to me to imply a distinction between the total value so ascertained and the total value afterwards referred to as to be ascertained on the basis of rent reserved and payments made in consideration of the lease. And this view seems to me to be confirmed by the fact that the object of the section is to ascertain the actual benefit accruing to the lessor by the determination of the lease, and that unless there is a distinction between the total values at the grant and the termination of the lease, in the majority of cases the benefit supposed to be shown by the valuations would have no relation to the actual facts.

"In my opinion, therefore, the representatives of the Commissioners of Inland Revenue have adopted the correct principle for ascertaining the total value at the grant of the lease, although I think their valuation requires some correction in detail. It should, in my opinion, be as follows :—

Agreed total value at end of lease			£2400
Rent reserved :			
Ground rent	£40		
Years' purchase	25		
		—£1000	
Payments made :			
Cost of erection, including builder's profit	£1050		
Reasonable interest, 8 per cent. ..	84		
Ground rent	40		
	124		
Years' purchase	18		
	£2232		
Deferred for term of lease, eighty years, on 5½ per cent. table ..	·013	29	1029
		Benefit	£1371

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"This modification in the valuation will, however, make no practical difference in the amount of duty payable, and therefore the decision on the appeal in respect of which the annexed notice of appeal has been given is as follows: That the assessment be confirmed, and that the appellants pay the costs of the Commissioners of Inland Revenue."

The appellants contended that the above decision was erroneous in point of law on the following grounds:—

(1.) Because the decision of the referee did not correctly interpret or give effect to the provisions of s. 13, sub-ss. 1 and 2, and s. 25, sub-s. 3, of the Finance (1909–10) Act, 1910, which were to be read together, and when so read meant that the total value of the land at the time of the original grant of the lease was the market value at that time of the fee simple in possession, not subject to any lease, ascertained on the basis of the rent reserved and the payments made in consideration of the lease.

(2.) Because in so far as the said decision, in approving the principle adopted by the respondents for ascertaining the total value at the grant of the lease, was based on the value of the lessor's interest in the land at the date of the grant thereof, the same was based upon an erroneous datum and was contrary to the true interpretation of the said sections.

(3.) Because the data, the method, and the result of the appellants' calculations were correct and in conformity with the true interpretation of the said sections.

Lush J. affirmed the decision of the referee, holding that "the total value of the land at the time of the original grant of the lease" was to be ascertained on the determination of the lease by adding to the capitalized value of the rent, not the amount expended in the erection of the buildings, but the present value of such amount as at the date of the lease on the basis that the enjoyment of such expenditure was, so far as the reversioners were concerned, deferred until the expiration of the term.

The Ecclesiastical Commissioners appealed. The appeal was heard on March 18, 1919.

Upjohn K.C., Ryde K.C., Barrington-Ward, and W. Allen for the appellants.

W. R. Sheldon (*Sir Gordon Hewart Att.-Gen.* with him) for the respondents.

The arguments sufficiently appear from the judgments. The following cases were cited: *Inland Revenue Commissioners* v. *Marquess Camden* (1); *Inland Revenue Commissioners* v. *St. John's College, Oxford.* (2)

Cur. adv. vult.

March 19. SWINFEN EADY M.R. read the following judgment. This appeal by the Ecclesiastical Commissioners from Lush J. raises a short question of reversion duty.

On June 28, 1907, the Ecclesiastical Commissioners entered into a building agreement with Messrs. Barlow & Roberts, whereby the latter agreed to build and completely finish on or before June 24, 1908, some buildings upon land of the Ecclesiastical Commissioners, and to expend thereon a sum not less than 3000*l.* And the Commissioners agreed when and so soon as such buildings were erected, built and completed in carcase to grant a lease for the term of eighty years from June 24, 1907, at the rent of 40*l.* for the first year and 160*l.* for the subsequent years.

Upon one of the houses being built under this agreement—namely, 26, Strutton Ground, Westminster—a separate lease was granted by the Commissioners to Messrs. Barlow & Roberts, which is dated December 19, 1907. By this lease the Commissioners demised the house and premises for eighty years from June 24, 1907, at the rent of 10*l.* for the first year and 40*l.* for each year subsequently. And the lessees thereby covenanted to completely finish fit for occupation the said premises before June 24, 1908.

On February 1, 1913, this lease was surrendered to the Commissioners to enable certain other arrangements to be carried out between the parties.

Upon this determination of the lease, reversion duty became payable under the Finance (1909–10) Act, 1910, s. 13.

(1) [1915] A. C. 241; [1914] 1 K. B. 641.

(2) [1915] 2 K. B. 621.

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The question raised by this appeal is what reversion duty would have been payable if the lease had expired by effluxion of time. When this sum has been ascertained the parties will have no difficulty in arriving at the amount now actually payable under the Revenue Act, 1911, s. 3, sub-s. 2.

The appellants contended that the "value of the benefit accruing to the lessor" by the determination of the lease is 168*l*. This figure is arrived at, as stated in the report (1), as follows:—

Rent reserved		£40 per annum.
Payments made:		
Cost to builder of erection of buildings	£900	
Builder's reasonable profit	150	
Normal cost to lessee	£1050	
Reasonable rate of interest which lessee would expect on such a property in this position, 8 per cent.		£84
Annual value which lessee would expect		£124 per annum.
Total value at grant (at eighteen years' purchase)		£2232
Total value at termination (as agreed)		£2400
Total value at grant (as above) ..		2232
Difference		£168

The Inland Revenue Commissioners on this appeal contended that "the value of the benefit accruing to the lessor" by the determination of the lease was 1371*l*. This figure was not their original figure, but was one determined by the referee and is arrived at as follows (2):—

Agreed total value at end of lease		£2400
Rent reserved:		
Ground rent	£40	
Years' purchase	25	
		£1000

(1) [1918] 2 K. B. 605. (2) [1918] 2 K. B. 608.

Payments made—			
Cost of erection, including builder's profit..	£1050		
Reasonable interest, 8 per cent. ..	84		
Ground rent	40		
	124		
Years' purchase	18		
	£2232		
Deferred for term of lease, eighty years, on 5½ per cent. table ..	·013	29	1029
	Benefit		£1371

It must be remembered that "the value of the benefit accruing to the lessor" is by s. 13, sub-s. 2, to "be deemed to be the amount" arrived at by the method prescribed by that sub-section—namely, omitting immaterial words, the amount by which the total value (as defined, etc.) of the land at the time when the lease determines exceeds the total value of the land at the time of the original grant of the lease, to be ascertained on the basis of the rent reserved and payments made in consideration of the lease. By s. 25, sub-s. 3, "total value" is defined; in the present case it is the same as "gross value," as there are not any deductions to be made from "gross value" to arrive at "total value." "Gross value" is defined by s. 25, sub-s. 1. By s. 41 the expression "lease" includes an underlease, and an agreement for a lease or underlease, and the expression "fee simple" means the fee simple in possession not subject to any lease. Both "gross value" and "total value" have reference to the value of the fee simple as thus defined—i.e., not subject to any lease.

The appellants contend that their value of 168*l.* is arrived at in the manner pointed out in s. 13, sub-s. 2. The total value at the time when the lease would determine by effluxion of time is an agreed figure, 2400*l.* From this amount the value at the time of the original grant of the lease has to be

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deducted. The cost of the erection of the building, including a reasonable profit to the builder, was 1050*l.* This is an agreed figure. In arriving at the total value of the land at the time of the original grant of the lease the appellants claim to have followed the statutory provisions, and to have ascertained the "total value" on the basis of a rent reserved and payments made in consideration of the lease. On this basis they make the total value at the date of the grant to be 2232*l.*, and deducting this sum from the agreed figure of 2400*l.*, the amount by which the total value at the later date exceeds the total value at the earlier date is 168*l.*, which, they contend, is the value of the benefit which would have accrued to the lessor at the determination of the lease.

It was conceded by the Inland Revenue Commissioners that, after the decision of the House of Lords in *Inland Revenue Commissioners* v. *Marquess Camden* (1) it must be taken as settled that the amount expended by the lessees in the building works was a payment made in consideration of the lease within the meaning of the section, and ought to be taken into account. Again, no distinction was attempted to be drawn between expenditure made after the agreement for the lease, and before the actual lease was executed, and expenditure made after the lease, within the six months allowed for the completion of the building. The argument on behalf of the Commissioners of Inland Revenue really amounted to this: that in ascertaining the total value at the time of the original grant of the lease you must have regard, not to the "total value" of the fee simple as provided by sub-s. 2, but to the value of a partial interest in the land (i.e., the land, subject to an eighty years' lease), and not of the fee simple as defined by the statute. In para. 12 of the petition to the Court by the Ecclesiastical Commissioners it is stated that evidence was given before the referee on behalf of the Inland Revenue Commissioners by Mr. R. A. Dash to the effect that total value means market value at the time of the original grant of the lease, meaning market value of the lessor's interest only. The figures are worked out in this

(1) [1915] A. C. 241.

way, and the value of a particular or partial interest in the land is so ascertained. In effect, the result is to deduct from the fee simple value the value of the leasehold interest and thus estimate the value of a reversionary interest only in the buildings. In my opinion this is contrary to the express language of the statute. "Total value" directed to be ascertained as at two separate dates means in each case total value as defined, subject at the earlier date to the directions on the basis of which the earlier value is to be ascertained.

When pressed, Mr. Sheldon conceded that, according to the figures which he put forward, the value ascertained at the earlier date was the value of a partial interest in the land, and not of the fee simple. It was urged that s. 13, sub-s. 1, really showed what was intended to be taxed. But this sub-section cannot be taken by itself. If this were to be done, there would be no benefit accruing to the lessor in the present case, as the surrender was merely part of a business transaction, whereby the lessees obtained full valuable consideration for their surrender. Moreover s. 13, sub-s. 2, in terms provides that the value of the benefit for the purpose of the section shall be "deemed to be" the amount arrived at as thereby directed. However artificial, the statutory directions must be followed, and effect must be given to the expressions used.

In my opinion the appeal should be allowed and the assessment should be discharged, and it should be declared that the value of the benefit accruing to the Ecclesiastical Commissioners should be calculated in the manner contended for by them.

WARRINGTON L.J. The question to be determined in the present case is on what principle the total value of the land at the time of the original grant of the lease is to be ascertained. The surveyor for the Crown and the referee have both taken the view that what is to be ascertained is the value at the time of the original grant of the lessor's interest in the land. I say this because each of them has arrived at the total value

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by calculating on the actuarial tables the deferred value at the expiration of the term of the rent and of interest on the expenditure capitalized for a certain number of years. This view has been adopted by Lush J., and I think is summed up in a single sentence (1): "The Act states what the basis of the calculation is to be, and leaves it to the valuer to say"; and then come the important words—"taking the length of the term and other matters into account, what the true value was."

The appellants contend that on the true construction of s. 13 of the Finance (1909–10) Act, 1910, "total value" must have the same meaning where it is used of the one period as where it is used of the other period, and that on this construction of the section what has to be determined is "the amount which the fee simple of the land, if sold at the time in the open market by a willing seller in its then condition, free from incumbrances, and from any burden, charge, or restriction (other than rates or taxes), might be expected to realise."

Now if the construction for which the appellants contend is correct then what has to be ascertained at the second period mentioned in the section, the earlier period in point of time, is the value of the fee simple of the land itself, not of any particular interest in the land. Is that the right construction or not? The section provides by sub-s. 1 that on the determination of the lease the reversion duty is to be levied on "the value of the benefit accruing to the lessor by reason of the determination of the lease," and then by sub-s. 2 that the value of the benefit accruing to the lessor is to be deemed to be a certain thing—namely, "the amount (if any) by which the total value (as defined for the purpose of the general provisions of this part of this Act relating to valuation)" —that refers to s. 25—"of the land at the time the lease determines . . . . exceeds the total value of the land at the time of the original grant of the lease." I pause there for one moment. It appears to me on all principles of construction that the expression "total value" must have the same

(1) [1918] 2 K. B. 613.

meaning given to it in both parts of the sub-section, unless, of course, there is something in the context which renders that construction impossible.

Now "total value" has by itself no meaning; that is, in law it has no meaning except by reference to the definitions contained in the Act, and when those definitions are examined it has the meaning to which I have already referred—namely, the amount which the fee simple of the land if sold at the time in the open market by a willing seller in its then condition might be expected to realize. Total value having, then, that special meaning, and being used in both parts of the sub-section, it must, in my opinion, have the same meaning attached to it in both parts. The only possible argument against that view is derived from the terms of sub-s. 1 of s. 13, which refers to the value of the benefit accruing to the lessor by reason of the determination of the lease. But that argument is rendered inapplicable, because by sub-s. 2 the value of that benefit is to be deemed to be that which I have already mentioned—namely, the amount by which the total value at the one time exceeds the total value at the other time. On that construction, in my opinion, the valuers for the appellants have proceeded on a right basis.

There remain to be considered the words following those which I have read in sub-s. 2, which show how the total value at the earlier period is to be ascertained. It is to be ascertained on the basis of the rent reserved and the payments made in consideration of the lease.

In the present case it is conceded that the 1050*l.*, being the amount actually expended by the lessee, together with a reasonable sum for builder's profits, is to be regarded as payments made in consideration of the lease; and, in fact, after *Lord Camden's Case* (1) the contrary could hardly be contended. We have, therefore, to ascertain the total value on the basis of the rent and of that expenditure of 1050*l.* Now what is meant by that? One approaches the consideration of these provisions with the knowledge that the Act has required that the value of the land shall be ascertained

(1) [1915] A. C. 241; [1914] 1 K. B. 641.

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at a period which may be getting on for a century earlier than the time at which the lease determines, and that the value at that remote period may be a matter of speculation, and accordingly the Act has provided for getting rid of all speculation of that nature by establishing a criterion by which that value shall be ascertained. It seems to me that the meaning of that part of the sub-section is this: that what has to be ascertained is the value of the fee simple free from encumbrances, and that value has to be deduced from the fact that a particular person, in the case supposed, the lessee, has been found who has paid for a limited interest in the land; first, so much rent; and secondly, so much money included in the expression "payments made in consideration of the lease." From those two factors so obtained the value of the fee simple is to be deduced.

The valuer for the appellants has proceeded on the right basis. The valuers for the Crown and the referee have proceeded on the wrong basis, and for these reasons the judgment of the Court in the present case ought, in my opinion, to be set aside.

SCRUTTON L.J. I agree in the result arrived at by my brothers, but as we are differing from the judge below and the referee, and the question is of general importance, I will express my judgment in my own words.

It is unnecessary to repeat the facts which have been stated by the Master of the Rolls; I deal merely with the construction of the Finance (1909–10) Act, 1910, s. 13, an Act which, in my experience, establishes a very artificial system in very vague language difficult to construe. I personally find it difficult to believe that if the individual members of the Legislature had been taken aside and cross-examined as to what they intended by any particular clause or what they thought they were doing, you would have got any intelligible result from such a cross-examination. However, one can only deal with their expressed intention as shown by the words they have used, if we can understand them. Sect. 13 proposes on the determination of a lease of land to levy a

reversion duty on the value of the benefit accruing to the lessor by reason of the determination of the lease. Now, if one stopped there, I think most people would be tempted to say: What benefit does the lessor get by the determination of the lease? The benefit is this: that there comes into his unfettered possession land with buildings from which previously he was only getting a small ground rent, and for which now he can get the full value by way of rent; and if one had nothing else but those words, one would be tempted to say the lessors in this case before the lease determined were getting 40*l.* ground rent, and when the lease is determined they are getting 140*l.* The 100*l.* a year dealt with on the appropriate tables would in some way represent the value of the benefit that they are getting by the determination of the lease. But the section does not stop there, because sub-s. 2 goes on and says: "For the purposes of this section the value of the benefit accruing to the lessor"—still using the same phrase as has been used in sub-s. 1—"shall be deemed to be." Now when I come to "deemed to be" in a section, I stop short and regard it as a danger signal, because when Parliament says that, in my experience, it is proposing to say that something shall be deemed to be some other thing which it is not. It is going to say that a thing which you would not expect to come within the words is to come within the words by reason of the statutory enactment that it "shall be deemed to be." Then the section states the rule by which the benefit accruing to the lessor is to be calculated. It is to be calculated by finding the excess over the total value of the land at the time of the original grant of the lease calculated in a particular way, of the total value of the land at the time the lease determines. "Total value," of course, is a phrase invented by the Act for which one has to look at the Act to find out what it means. One finds in s. 25 that "total value" is gross value after deducting certain amounts which do not affect this case. For the purposes of this case total value is gross value, and going to the definition of "gross value," gross value is the amount which the fee simple of the land if sold at the time in the open

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market by a willing seller in its then condition, free from encumbrances, might be expected to realize. Therefore to get the amount at the end of the lease you have to see what is the value of the land in the open market if so sold. In this case there is no difference between the parties as to what that value is: it is 2400*l*. So far no difficulty arises. The last sum you have to deal with is 2400*l*. Now what is the first sum, the value at the beginning of the lease? It is "the total value of the land"—that is the same phrase as has been used before—"at the time of the original grant of the lease to be ascertained on the basis of the rents reserved and payments made in consideration of the lease." That appears to tell you that you are to calculate the value of the land at the beginning of the lease, not in the way prescribed by s. 25 directly, but on the basis of the rent reserved and payments made in consideration of the lease.

Now but for *Lord Camden's Case* (1) we should have had an argument of considerable difficulty and length because the statute does not say to whom the payments are to be made, and it does not therefore expressly say that, supposing the lessee does not make the payments to the lessor but expends work and material of his own on the land you may take that into account in getting at the total value of the land. We are bound by that decision to say that you can take into account both payments made by the lessee and the money value of materials used and work done by the lessee on the land if it was done in consideration of the lease. Indeed in this case we are to go further because both sides agree that to the actual expenditure made by the lessee you may add 150*l*. for builder's profit, which was not a payment at all. Both sides agree to that, and I therefore deal with the case on that supposition without expressing any opinion whether that can be got out of the words of the Act by any further process. We have got therefore as far as this, that payments made may include expenditure by the lessee not paid to the lessor.

Now in this case no point is raised, indeed the Crown expressly said they did not argue, that it made any difference

(1) [1915] A. C. 241; [1914] 1 K. B. 641.

whether the expenditure was before or after the grant of the lease; and I, therefore, do not express any opinion upon the subject. The Crown has not argued it; it is not raised in this case, but I do desire to say that in the judgments of the Court of Appeal in *Lord Camden's Case* (1) both the late and the present Master of the Rolls appear to have attached some importance to the fact that the payments were made before the grant of the lease. Cozens-Hardy M.R. says: "Now it is important to observe that the whole 6000*l.* was spent before the lease was granted. That sum was really part of the consideration for the lease and must be regarded in a wholly different way from sums paid during the currency of the lease in performance or satisfaction of the covenants contained in the lease"; and the present Master of the Rolls says: "It is in my judgment equally a payment, in consideration of the lease, although paid to third parties, when it is a payment made by the lessee before the lease is granted, and to pay for works forming part of the consideration for the lease." However, the Crown in this case has raised no question as to the payments being made before or after the grant of the lease, and I therefore do not deal with it, except to say this—that when, if ever, it becomes necessary to ascertain what nobody, in my respectful apprehension, has yet succeeded in ascertaining, what is the exact meaning of the words in the parenthesis about nominal rent, and why they were introduced into the section, it may be necessary to consider whether or not there is a difference between payments made before the lease is granted and payments made after the lease is granted in pursuance of a covenant or undertaking to erect buildings. But I do not regard that question as being raised in this case, and I therefore express no opinion upon it, and, indeed, at present frankly do not understand the parenthesis at all.

Now having got as far as that by reason of the decision in *Lord Camden's Case* (2), what is one to do to get at the value at the date of the lease? In my view you are to do what amounts to a rule of three sum. It may be the reason for

(1) [1914] 1 K. B. 641, 652, 655. (2) [1914] 1 K. B. 641.

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Scrutton L.J.

this was that it was thought that a lease might be for 99 years or for 999 years or for a long period, and that it would be pure speculation as to what would have been the value as between a willing seller and a willing buyer a hundred years before, but that you are on a firm ground if you know what amount somebody was willing to pay for the lease. You have to do this sort of rule of three sum: As the term of the lease is to the fee simple so are the payments actually made to the gross value. The first three items are known; the fourth, or statutory gross value, will be reached by calculation from the three known items. Now using the best appreciation of the language used that I can, that is what Parliament must have meant when it said that the total value of the land was to be ascertained on the basis of starting from the foundation of the rent reserved and payments made. Somebody was willing to pay so much for the use of the land for so many years. You infer from that that anybody getting the use of the land in fee simple for the full term of the possible existence of the land would be willing to pay some proportionate sum more. That on the best understanding that I can give to the language of the statute is what the section means.

Now that process does not seem to me to be the one which the learned judge below and the referee have adopted. They seem to have been not unnaturally impressed by the use twice in the section of the words, "benefit accruing to the lessor," and to have approached the matter from the point of view that they have to value what benefit comes to the lessor. They appear to me to have taken this line, if I may read what Lush J. says (1): "I think that it was also intended, if not primarily intended, to meet the not uncommon case of the owner of land parting with the land and the usufruct of the land for a defined period, taking a comparatively small sum by way of rent during that period with a view to securing at the end of that period a property which has been greatly enhanced in value by reason of the expenditure of money by the lessee. The principle contended for by the appellants takes no account of this

(1) [1918] 2 K. B. 602, 612.

benefit and leaves it untaxed. That the freeholder does obtain a benefit or advantage through the lease coming to an end is obvious. The advantage which the lessee had enjoyed during the term of obtaining the full rent, for which he was willing to make the agreed payments, has now passed to the freeholder." And the referee and the learned judge below seem each to have taken this view: "I can get at the value of the land at the start in this way (following the language of the Act) on the basis of the rent and payments. Capitalize the rent, capitalize the payments, but the lessor is not going to get the benefit of those payments until the determination of the lease, say eighty years hence, so do not give him the amount of the payments but give him the present value of those payments received eighty years hence." That, I think, seems to be the line of argument on which the referee and the learned judge below got at their result. With great deference to both of them that appears to me to be to value not the full value of the land but the lessor's interest in the land, taking into account that the lessor will not get part of it for eighty years, which is why the total payments are reduced to the present value of a sum the benefit of which he will receive eighty years hence. That seems to me to be following the words at the beginning of the section and not giving effect to the statutory instruction as to what shall be deemed to be the benefit to the lessor and how it shall be calculated.

As I have said, I express no opinion whether the individual Members of Parliament meant this. I very much doubt whether they understood what they were doing at all, but on the words they have used of their expressed intentions that seems to be the only construction to be put upon s. 13. It may be that that section does not in effect tax money benefits accruing to the lessor by reason of the determination of the lease. That is because Parliament has given a particular direction as to the way in which the benefit shall be calculated, that the benefit shall be deemed to be something which does not truly represent the actual benefit.

For these reasons, which are general reasons applying to the construction of the statute (I have not said anything

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as to its application in this particular case), I concur in the judgment which has been delivered by my brothers.

Appeal allowed.

Solicitors for the appellants: *Milles, Jennings, White & Foster.*

Solicitor for the respondents: *The Solicitor of Inland Revenue.*

W. I. C.

1919 *April* 3.

OLLETT, APPELLANT *v.* HENRY, RESPONDENT.

Local Government—Food—Unsound Meat—Deposit for Local Distribution—Deposit "for the purpose of sale"—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 116, 117—*Public Health Acts Amendment Act,* 1890 (53 & 54 *Vict. c.* 59), *s.* 28.

A consignment of meat was sent by the Ministry of Food to premises of a company for distribution by the company in the locality. The company had no voice in the selection of the meat, which was simply allotted to them for distribution among the butchers to whom the agent of the Ministry allocated it, the company being bound to comply with his directions and not responsible for his acts. The meat never became the property of the company. The company collected from the butchers the money paid by them for the meat and forwarded it without deduction to the Ministry, who allowed them a fixed commission on the price of the meat distributed by them. Two carcases of lamb forming part of the consignment and on the premises of the company were seized and condemned as unwholesome and unfit for the food of man. The respondent, who was the secretary of the company, was charged under ss. 116 and 117 of the Public Health Act, 1875, as extended by s. 28 of the Public Health Acts Amendment Act, 1890, with having had in his possession at the premises deposited for the purpose of sale and intended for the food of man the carcases so seized and condemned. On the hearing of the charge, and on proof of the facts stated above, it was contended for the respondent that the two carcases were deposited for the purpose of distribution only and not for the purposes of sale, and the justices being of that opinion dismissed the charge:—

Held, that the distribution of the meat by the company to the butchers was part of the sale of the meat by the Ministry to the butchers, and, therefore, that the carcases by being deposited for the purpose of distribution were deposited "for the purpose of sale" within the meaning of the above-mentioned sections and that the case should go back to the justices to convict the respondent.

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CASE stated by justices for the county borough of Eastbourne.

An information under ss. 116 and 117 of the Public Health Act, 1875, as extended by s. 28 of the Public Health Act, 1890, was preferred by the appellant, an inspector of nuisances, against the respondent, the secretary of Armour & Co., Ltd., hereinafter called "the company," meat salesmen and importers, alleging that the respondent on October 12, 1918, had in his possession at premises in Eastbourne deposited for the purpose of sale and intended for the food of man a certain article of food, to wit, two carcases of lamb, which on that date were lawfully seized by the appellant and condemned and ordered to be destroyed by a justice as being unwholesome and unfit for the food of man.

At the hearing of the information the following facts were proved :—

On October 12, 1918, the appellant visited the said premises which were then occupied by the company for the purpose of their business. He there saw two carcases of lamb which were extremely emaciated and consisted of little more than the skeletons with the skin stretched over them, being practically devoid of fat. From their appearance the appellant came to the conclusion that in life the animals had suffered from a wasting disease known as "fluke" or "liver rot" caused by a parasite which infects the liver and is picked up by animals when grazing. These two carcases appearing to be, and being in fact, unwholesome and unfit for the food of man, were on that date seized by the appellant and ordered to be condemned, and it was in respect of them that the information was laid.

These two carcases formed part of a quantity of meat which was allocated to Eastbourne by the Ministry of Food, and they were included in a consignment which was sent from Smithfield Market and arrived at the said premises of the company on the above-mentioned date at 6 A.M. The local manager of the company had no voice in the selection of the carcases, which were simply allotted to the company for transmission to and distribution amongst the butchers in Eastbourne to whom the local agent of the Ministry allocated

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them. The company had to comply with the directions of the agent and were not responsible for his acts as he had complete control. It was the duty of the company to distribute the meat amongst the butchers in specified quantities in accordance with instructions given by the agent, and they did in fact so distribute it. The meat so supplied to the company never became their property. The company collected from the butchers the purchase money for the meat distributed to them, banking it at Eastbourne and then forwarding it to London and paying it to the Ministry without deduction. A fixed commission of 2½ per cent. on the prices of the meat distributed was allowed by the Ministry to the company, who had no other financial interest in the supply.

The meat in respect of which the information was preferred was on the premises of the company and in the physical possession and under the control of the respondent for the purpose only of being distributed in accordance with instructions received from the agent of the Ministry, and in accordance with the practice set out above.

It was contended for the respondent that as the meat was upon the premises for the purpose of distribution amongst the butchers, and as the company had to distribute the meat in accordance with the directions given to them on behalf of and at a price fixed by the Ministry, the carcases did not belong to the company and were not exposed by them nor deposited by them nor on the premises for the purpose of sale.

It was contended for the appellant that the meat being on the premises in the circumstances and for the purpose above set out was deposited for the purpose of sale within the meaning of s. 116 of the Public Health Act, 1875.

The justices were of opinion that it had not been proved that the two carcases of lamb were on the premises for the purpose of sale within the meaning of ss. 116 and 117 of the Act of 1875, and they dismissed the information upon that ground.

The question for the Court was whether upon the facts above set out the decision of the justices was correct in law.

Montgomery K.C. and *L. G. H. Horton Smith* for the appellant.

On the true construction of ss. 116 and 117 of the Public Health Act, 1875, or of these sections as altered by s. 28 of the Public Health Acts Amendment Act, 1890, a person in whose possession meat has been found which was intended for the food of man and has been seized and condemned as unsound and unfit for the food of man has committed an offence and is liable to be convicted under the latter section whether the meat was deposited for the purpose of sale or not; and, that being so, it plainly appears from the case stated that the only facts necessary to render the respondent liable have been proved.

Even if under these sections it is required in order to constitute the offence that the further ingredient should be added that the meat was deposited for the purpose of sale, the facts necessary to render the respondent liable have been proved. It appears that the meat was sent by the Ministry of Food to the premises of the company of which the respondent is secretary for the purpose of being sold by them as the agents of the Ministry to the local butchers, and for no other purpose, and it was, therefore, clearly deposited at the premises of the company for the purpose of sale. If the meat was sent by the Ministry to the premises of the company for the purpose only of being distributed by the company to butchers to whom it was sent by the company, the distribution was an essential part of the sale, and the deposit for the purpose of distribution was, therefore, a deposit for the purpose of sale.

Under s. 16 of the Act of 1875 it was for the respondent to prove that the meat was not deposited for the purpose of sale and he has failed to do so.

The respondent is liable to conviction notwithstanding that the meat was not exposed for sale: *Mallinson* v. *Carr*. (1)

Snagge for the respondent. In order to constitute the offence with which the respondent is charged under ss. 116 and 117 of the Public Health Act, 1875, it is necessary that the meat should be deposited "for the purpose of sale,"

(1) [1891] 1 Q. B. 48.

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that it should be intended for the food of man, that it should be unsound or unfit for the food of man, and that it should be in the possession of the person charged. It has not been proved that the carcases here in question were deposited for the purpose of sale within the meaning of the sections. They were never in fact sold, and they were not necessarily sent to the premises of the company of which the respondent is secretary for the purpose of sale. It has only been proved that the meat was on the premises for the purpose of being distributed in accordance with instructions from the Ministry of Food. The Ministry may not have proposed, and might never have given instructions for, the sale of the meat. Even if the Ministry intended to sell the meat, or if the meat had been sold in accordance with their instructions, it was not deposited for the purpose of sale, but only for the purpose of distribution by the company as a mere piece of machinery to the butcher to whom it was sold by the Ministry.

BRAY J. This is an appeal against the decision of the justices dismissing an information under ss. 116 and 117 of the Public Health Act, 1875, against the respondent, the secretary of a company of meat salesmen, for having had in his possession at premises in the occupation of the company deposited for the purpose of sale and intended for the food of man, two carcases of lamb which were unwholesome and unfit for the food of man. The justices dismissed the information on the ground that it had not been proved that the carcases were deposited on the premises "for the purpose of sale" within the meaning of ss. 116 and 117. The only question in dispute is whether they rightly dismissed the information on that ground. It was proved that the meat was on the premises and in the physical possession and under the control of the respondent for the purpose only of being distributed in accordance with the practice set out in the case stated. From that it appears that the meat was allocated to the company by the Ministry of Food and was deposited at the premises of the company for the purpose of distribution amongst the local butchers in accordance with the instructions

of the local agent of the Ministry, the company receiving payment from the butchers for the meat supplied to them and forwarding the money to the Ministry. In my opinion the distribution of the meat by the company to the butchers was part of the sale of the meat by the Ministry to the butchers. It follows that if, as is said by the respondent, the meat was deposited on the premises for the purpose of distribution by the company to the butchers, it was also deposited for the purpose of the sale that was intended to be made by the Ministry to the butchers. I am satisfied that the meat in question was deposited on the premises "for the purpose of sale" within the meaning of the sections. I think that the appeal should be allowed, and that the case should go back to the justices with a direction that they ought to convict the respondent.

A. T. LAWRENCE J. I am of the same opinion. The argument of counsel for the respondent would be more convincing if he had only to deal with the facts that the unsound meat was on the premises of the company for which the respondent is secretary and in the possession and under the control of the respondent for the purpose of being distributed amongst the butchers. He cannot, however, stop short of the further facts that the meat was to be distributed in accordance with the practice that is described in the case stated. According to that practice meat is allotted by the Ministry of Food to the company whose duty it is to distribute it amongst the local butchers in accordance with instructions given to them by the local agent of the Ministry, the company receiving from each butcher payment of the purchase money for the meat supplied to him and forwarding the money as received to the Ministry, who allow the company a commission on the prices paid. Having regard to that practice it seems to me that it cannot be said that the meat in being deposited with the company for the purpose of distribution was not deposited "for the purpose of sale" within the meaning of ss. 116 and 117 of the Act of 1875. The so-called "distribution" was but a step in the process of "sale." The Act lays upon

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the respondent the onus of proving that the unsound meat was not deposited at the premises for the purpose of sale, and in my opinion he has failed to discharge that onus.

SHEARMAN J. I agree.

Appeal allowed. Case remitted.

Solicitors for appellant: *Sharpe, Pritchard & Co., for H. West Fovargue, Eastbourne.*

Solicitor for respondent: *E. P. Lickfold.*

J. R.

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March 21, 27, 28, 31.

[IN THE COURT OF APPEAL.]

SINGER *v.* WILLIAMS.

Revenue—Income Tax—"Income arising from securities, stocks, shares, or rents . . . . in any place out of the United Kingdom"—Computation—Average of the three preceding Years—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched. D, Fourth and Fifth Cases—Finance Act,* 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 5.

The appellant, who resided in the United Kingdom, was assessed to income tax for the year ending April 6, 1916, in respect of the income which he received as a shareholder in an American corporation, the computation being based on the average amount of profits during the three years preceding the year of assessment. The appellant contended that in view of the terms of s. 5 of the Finance Act, 1914, the tax ought to be computed on the basis of the actual amount of his profits in the year of assessment, and that in any event no income arising from the shares which was paid or became due before April 6, 1914, could be brought into computation:—

Held, that the shares in question were "foreign possessions" within the fifth case of Sched. D under s. 100 of the Income Tax Act, 1842, and not "foreign securities" within case four. The tax was therefore properly computed on the three years' average. By s. 5 of the Act of 1914 the provision limiting the taxable income to that which was received in the United Kingdom was abrogated, the method of computing the tax under the Act of 1842 remaining unaffected. The effect of clause (*b*) of the section was to exclude from taxation income which was paid or became due before April 6, 1914, but not to exclude it from the computation of the three years' average in order to arrive at the amount of the tax.

Dicta of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* [1893] 2 Q. B. 499, 516 and of Fletcher Moulton L.J. in *Gramophone & Typewriter, Ld.* v. *Stanley* [1908] 2 K. B. 89, 104 approved.

Decision of Sankey J. [1918] 2 K. B. 432 affirmed.

APPEAL from a decision of Sankey J. [1918] 2 K. B. 432, on a case stated by the Commissioners for the General Purposes of the Income Tax Acts for the division of Romsey in the county of Southampton.

The facts stated in the case are set out in the report in the Court below. Shortly stated they were as follows.

The appellant resided and for several years past had resided in the division of Romsey. He had been assessed to income tax under Sched. D of the Income Tax Acts for the year ending April 5, 1916, in the sum of 80,000*l.* in respect of foreign possessions. His income so far as it was the subject-matter of the assessment in question was derived from the dividends which he received as a shareholder in an American corporation, namely, the Singer Manufacturing Co. of New Jersey in the United States of America. On October 6, 1916, he appealed against the assessment on the ground that in view of s. 5 of the Finance Act, 1914 (1), the computation of the tax ought to have been based on the actual amount of the profits in the year of assessment, and not, as had been done, on the average amount thereof in the three preceding years. The Commissioners upheld the principle of assessment that had been adopted, but stated a case for the opinion of the High Court. Sankey J. confirmed the decision of the Commissioners, and the subject now appealed.

Sir J. Simon K.C. and *Edwardes Jones* for the appellant. Upon the plain words of s. 5 of the Act of 1914 the appellant

(1) Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 5: "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not . . . . ; and the provisions of the Income Tax Acts . . . . shall apply accordingly, and nothing in those provisions as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year any sums which represent: (*a*) income from any such securities, stocks, shares, or rents, on which income tax has been paid under this section; or (*b*) income from any such securities, stocks, shares, or rents which was paid or became due before the sixth day of April, 1914."

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is only liable to be assessed on the actual income arising from the shares in the current year of assessment, and not upon an average of the three preceding years.

In Sched. D of s. 100 of the Income Tax Act, 1842, a distinction is drawn between income arising from foreign securities on the one hand and from foreign possessions on the other. Under the fourth case of the schedule income from foreign securities is to be computed on the full amount of the sums received or to be received in Great Britain during the current year; while under the fifth case income arising from foreign possessions is to be computed on the sums annually received in Great Britain, taking the average of the three years preceding the year of assessment. It is submitted that shares such as those forming the subject-matter of the present case are included in the term "securities," and therefore come within the fourth case and are assessable on the income arising in the current year of taxation.

It was decided in *Colquhoun* v. *Brooks* (1) that income of a person residing in the United Kingdom arising from a trade carried on entirely abroad fell under the head of income arising from "possessions in any of Her Majesty's dominions out of Great Britain, or foreign possessions" within the fifth case of Sched. D in s. 100 of the Act of 1842, and that so much only of the profits of that trade as were received in the United Kingdom was liable to tax. But there Lord Herschell used the word investments as equivalent to foreign securities, and obviously intended to include shares in companies in that description. By s. 5 of the Act of 1914, the liability to tax has been extended to the full amount of such income, whether received in the United Kingdom or not. The term "securities" in s. 5 of that Act includes shares in a foreign company, and the appellant is taxable, under the fourth case of Sched. D in s. 100, on the income arising from his shares in the current year. In *Bartholomay Brewing Co.* v. *Wyatt* (2) it was held that the profits of an English company which formed an American company to carry on in the United States a brewery owned by the English company arose from

(1) (1889) 14 App. Cas. 493, 505. (2) [1893] 2 Q. B. 499.

"foreign possessions" so as to bring the case within case 5; but there the entire trade in America was owned by the English company, and the observation of Wright J. in that case, that shares in a company are not "securities" within the fourth case, is a dictum only. There is no ground for such a contention. In *Gresham Life Assurance Society* v. *Bishop* (1) the House of Lords treated income arising from foreign securities, including dividends on foreign investments, as coming within the fourth case. It was thought otherwise in the Court of Chancery until the decision in *In re Rayner* (2), where it was held that "securities" included shares in a company. That was followed in *In re Gent & Eason's Contract* (3), where the word "securities" was treated as synonymous with "investments." In *Gramophone & Typewriter, Ld.* v. *Stanley* (4) the question was to whom did the foreign business belong, and by whom was it being carried on. The statement therefore of Fletcher Moulton L.J. that "the holding of shares in a foreign corporation, entirely situated and carrying on business in a foreign country, comes unquestionably under case 5" is, equally with the expression of Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (5), only a dictum.

"Securities" do not necessarily mean securities for the payment of money in the strict sense of the word: *Trafford* v. *Boehm* (6); *Smiles* v. *Australasian Mortgage & Agency Co.* (7) See also the Oxford English Dictionary, where the widest meaning is given to the term.

The word is defined in the Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 2, sub-s. 10 (viii.), and in s. 50 of the Trustee Act, 1893 (56 & 57 Vict. c. 53), as including "stocks, funds, and shares." See also the definition in s. 3 of the Court of Chancery (Funds) Act, 1872 (35 & 36 Vict. c. 44).

Contrasting "securities" with "possessions" the former

(1) [1902] A. C. 287.
(2) [1904] 1 Ch. 176.
(3) [1905] 1 Ch. 386.
(4) [1908] 2 K. B. 89.
(5) [1893] 2 Q. B. 499.
(6) (1746) 3 Atk. 440, 444.
(7) (1888) 2 Tax Cas. 367, 378.

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word is used in a wide sense, and is not confined to sums of money secured by a charge.

Sect. 5 of the Act of 1914 brings together in one class "securities," "stocks," "shares" and "rents," of which "securities" clearly fall within case 4, and provides that income tax in respect of income arising therefrom shall be computed on "the full amount of the income," which means the full amount of the income arising during the current year, and excludes any idea of an assessment on a three years' average. The provision that income tax is to be computed on the full amount of the income "notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842," shows that it was intended to preserve the distinction between income from foreign "possessions," which is assessable on the three years' average, and income arising from foreign "securities," which falls to be assessed on the other principle. When an English banker collects for a customer warrants for dividends on shares in a foreign company the Legislature has cast upon the banker the duty of deducting the tax before crediting the customer with the amount of the dividend. That cannot be done on the average principle. The banker, according to the practice of the Inland Revenue, deducts the tax on the actual amount of the dividend for the current year and pays it to the Government. In the case of English dividends the tax is computed on the three years' average, but not so in the case of dividends on foreign investments, which are taxed on the yearly principle. Customs and Inland Revenue Act, 1885 (48 & 49 Vict. c. 51), s. 26; Revenue (No. 2) Act, 1861 (24 & 25 Vict. c. 91), s. 36. The Income Tax law draws a distinction between the tax paid by the company and the burden borne by the shareholder on the amount he receives in any given year. But even if the shares in question fall within the fifth case and the principle of average must be applied, it is still submitted that no income paid or which became due before April 6, 1914, can be brought into computation. Sect. 5, cl. (*b*). The Act is not retrospective.

Sir Gordon Hewart A.-G. and *T. H. Parr* for the Crown were not called upon to argue.

Cur. adv. vult.

March 31. SWINFEN EADY M.R. The questions raised by this appeal are whether the dividends which the appellant, W. M. G. Singer, receives as a shareholder in the American corporation entitled The Singer Manufacturing Co. of New Jersey in the United States of America, fall to be assessed for income tax under the fourth case of Sched. D as "foreign securities" or under the fifth case of Sched. D as "foreign possessions"; and, if the latter, whether any sums which were paid or became due in respect of dividends before April 6, 1914, can be brought into the computation in ascertaining the average of the three years previous to the year of assessment. The assessment in question is for the year ending April 5, 1916.

Before the Finance Act of 1914, income tax was levied upon the amount received in the United Kingdom in respect of income from "foreign securities" and "foreign possessions," but by the Finance Act, 1914, s. 5, the tax "in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom" . . . . "shall be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not." The appellant has been assessed for the year 1915–16 upon the dividends received from the American company on an average of the three preceding years, as directed by Sched. D, fifth case. The appellant contends that such assessment is erroneous, and that the assessment should have been on the income of the current year, in accordance with Sched. D, fourth case. This depends upon whether the shares in companies abroad fall within the description of "foreign securities" in the fourth case or "foreign possessions" in the fifth case.

In *Bartholomay Brewing Co.* v. *Wyatt* (1) it was held by Wright J. that profits received in England, from shares in an American brewery company held here, fell within the

(1) [1893] 2 Q. B. 499.

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fifth case, and not within the fourth case, " shares in a company are not securities, but portions of its capital." (1) Again in *Gramophone, Ld.* v. *Stanley* (2) Fletcher Moulton L.J. expressed the same view. " The holding of shares in a foreign corporation, entirely situated and carrying on business in a foreign country, comes unquestionably under case 5." (3) And again (4): " The shares remain, in my opinion, possessions in that foreign country and come under the fifth case." The language used by Lord Herschell in *Colquhoun* v. *Brooks* (5) is not in any way inconsistent with this view. He refers to income arising from " investments or from possessions outside the United Kingdom," and may well have used the term " investments " as equivalent to " foreign securities," without intending to include shares in companies in that description, but including shares in companies abroad under the description of " possessions outside the United Kingdom."

I am of the same opinion as Wright J. and Fletcher Moulton L.J. that the word " securities " in the fourth case does not include shares in companies, which are not " securities " in any proper sense of the word, although the same word with a context to aid it may in some cases, for instance in wills, be used with a sense and meaning extending to include shares in companies. The word " shares " as used in the latter part of Sched. D, fourth case, obviously means " shares of annuities," and does not assist to give any wide meaning to " securities." The result is that shares in American companies come within the fifth case as " foreign possessions."

It was further urged that the language of s. 5 of the Finance Act, 1914, precluded any computation based upon an average of the three preceding years, as the section says " notwithstanding anything in the rules under the fourth and fifth case under s. 100 " of the Act of 1842, but these words are used as these two rules are departed from by including for taxation the full amount of the income, and not merely the amount received in the United Kingdom, as provided for by both these rules.

(1) [1893] 2 Q. B. 516.
(2) [1908] 2 K. B. 89.
(3) [1908] 2 K. B. 97.
(4) [1908] 2 K. B. 104.
(5) 14 App. Cas. 493, 505.

The remaining point taken by the appellant was that, having regard to cl. (*b*) of the Finance Act, 1914, s. 5, any income which was paid or became due before April 6, 1914, ought not to be included in computing the average of the three preceding years, and as these three years are 1912–13, 1913–14, and 1914–15, the effect would be to exclude two years from the computation. In my opinion there is no foundation for this contention. The income referred to in cl. (*b*) is excluded from taxation, but is not excluded from the computation of the three years' average, in order to arrive at the amount of the current year's income to be taxed.

In my opinion the appeal fails, and should be dismissed.

WARRINGTON L.J. The question in this case is whether in assessing the appellant to income tax on income from shares in a foreign company the duty to be charged should be computed on the income of the current year or on an average of the three preceding years.

Subject to two minor points, which I will deal with hereafter, the decision turns on the further question whether the shares are to be treated as securities, and therefore within case 4 under Sched. D, or as "possessions," and therefore within case 5. The answer depends on the true construction of the language in which cases 4 and 5 are expressed.

Dealing with the question in the first instance without reference to authority, I am of opinion that, although for some purposes and in some contexts the word "securities" may have a meaning wide enough to comprise a number of things which are not securities for money in the proper sense, in this statute the word has not that wider meaning, and that shares in a trading company are comprised in the expression "possessions" and are therefore within the fifth case. The reason for providing for computation on an average in the one case and not in the other seems obvious, namely, that the one class of income may be liable to fluctuation, whereas the other would normally be constant. Income from shares in a company may be, and often is, liable to fluctuation, and one would expect therefore to find it included in the fifth

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case rather than under the head of income from securities which normally at all events may be expected to be constant. Moreover, shares in a company are in truth portions of its capital, and are not properly described as securities.

The question, however, has already been decided, in accordance with the view expressed above, in *Bartholomay Brewing Co.* v. *Wyatt.* (1) It is true that the shares there in question constituted the entire capital of the foreign company; this fact, in my opinion, has no material bearing on the question. An opinion to the like effect was expressed by Fletcher Moulton L.J. in *Gramophone & Typewriter, Ld.* v. *Stanley.* (2)

On principle, therefore, as well as on authority, I think the income in the present case falls under case 5, and not under case 4. It was contended that this construction should, if possible, be avoided, inasmuch as it gives rise to a difference in the mode of dealing with income from shares in British companies and income from shares in foreign companies. It is said that a shareholder in a British company pays tax at the current rate in the *l.* on the actual amount of his dividend warrant, whereas, acting on the view expressed above, a shareholder in a foreign company would pay tax on the average of his warrants for three years. But this apparent anomaly arises from the fact that in the case of a British company the shareholder is paying a part of the tax paid by the company, and this has already been computed on the principle of average. In the case of a foreign company the profits of the company itself cannot be charged at all, and the tax falls for the first time on the income of the shareholder. At any rate it seems to me that the suggested anomaly arises from the plain words of the Act, and that we ought not, because of it, to give a strained and unnatural construction to those words.

It was further contended that under s. 26 of the Customs and Inland Revenue Act, 1885, and the sections there referred to of earlier Acts, a banker collecting the amount of warrants for his customer would have to deduct and pay the tax at

(1) [1893] 2 Q. B. 499. (2) [1908] 2 K. B. 97.

the current rates on the amount of such warrants without reference to the principle of average. But assuming that a banker merely collecting a warrant for an ordinary customer is within that section, as to which I express no opinion, I see no difficulty in adjusting the liability of the taxpayer on the principle of average. The provision in question is merely intended to facilitate collection, and does not determine the position of the taxpayer as between himself and the Crown.

It remains to consider two points taken on the construction of s. 5 of the Finance Act, 1914, by which the tax is imposed on the entire income from shares in foreign companies whether received in the United Kingdom or not. The first arises on the opening words of the section: "Income tax in respect of income arising from . . . . shares . . . . in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not." It is in the rules there referred to that the provision is found limiting the tax to income received in the United Kingdom, and it is in the rule under the fifth case that the provision is found for computation on an average of three years, and it is contended on the part of the appellant that both these provisions are abrogated by the words "notwithstanding," etc. In my opinion, however, the words "whether the income has been or will be received in the United Kingdom or not" show that what was intended to be abrogated was the provision limiting the taxable income to that which is received in the United Kingdom, and that the method of computation remains unaffected.

The second point arises on the words "Nothing in those provisions" (namely, the provisions of the Income Tax Acts) "as to the receipt of sums in the United Kingdom shall be construed so as to render liable under those rules to income tax for the current or any subsequent year any sums which represent (*b*) income from any such . . . . shares . . . . which was paid or became due before April 6, 1914." The year of assessment in the present case ended on April 5,

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1916, and it is contended that the provision I have read prevents the application of the principle of average inasmuch as two of the three years would be prior to April 6, 1914. The answer is that it is not sought to render liable to tax any income which was paid or became due before that date. Such income is only taken account of for purposes of computation.

On the whole I am of opinion that the appeal fails, and must be dismissed.

SCRUTTON L.J. Before 1914 foreign securities and foreign possessions paid income tax on the income received in England. The Finance Act of 1914 substituted the full amount of income for the income received. Mr. Singer, who derives income from shares in a United States company, and who is a member of a family which has done much to elucidate the law of income tax in England by its struggles to pay no more than the amount that in its view it justly ought to pay, raises three points on the construction of that Act. The actual point raised appears to me to be of comparatively small importance, for if Mr. Singer's view that he is only to be taxed on the income of the year prevails in this year he gets a benefit, but he will have to pay more in some subsequent year than he would have done if the doctrine of average prevailed. In the long run he will remain as he was whichever system is adopted, but he would in this year get a temporary benefit which he would lose in some future year if his construction is adopted.

The first point that he takes is that his income is from "securities" under case 4 and not from "possessions" under case 5; and he says that shares in foreign companies are "securities" and not "possessions." The word "securities" seems to me quite inappropriate and inaccurate to describe shares in companies. Shares in companies and the income therefrom are not secured on anything. The share is a part of the capital—not a security. The income, the dividend, is not secured on anything. Further, the word "securities" was first used in 1842. The first English Limited Liability Company Act was in 1844, and limited liability

companies were then a very rare thing. As far as I know there were no foreign limited liability companies in 1842, and it seems to me therefore very unlikely that the word 'securities' was selected by the Legislature in 1842 to cover a non-existing form of property at the time. So much without authority.

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With regard to authority we have the decision of Cave J. and Wright J. in *Bartholomay Brewing Co.* v. *Wyatt* (1) that shares in an English company carrying on a business abroad are foreign possessions and fall within case 5, and not within case 4; and we have what impresses me very considerably, that after that decision Parliament has, in my view, twice recognized and adopted its accuracy. When in the Finance Act of 1914 this matter was dealt with Parliament expressly adopted the language "securities, stocks, shares, or rents," using "stocks" and "shares" as distinguished from "securities." I am also impressed by the fact that when Parliament last year codified the Income Tax Acts, purporting only to codify them and not to amend them, it expressed the law on this point in its schedule in case 5, "The tax in respect of income arising from stocks, shares, or rents shall be computed on the full amount thereof on an average of the three preceding years." On calling Sir John Simon's attention to that view of the Legislature, he says boldly that the Legislature was wrong, that it made a mistake, and that in purporting to codify the Act it has really amended it. A more natural explanation appears to me to be that the view which Parliament had adopted, which was the view of Cave J. and Wright J., was the correct view, and that therefore shares in a foreign company fall, as I have said, within foreign possessions in case 5 and not within securities in case 4.

But a very elaborate argument was addressed to us, that the practice of banks under a series of sections to which we were referred show that the view which I have hitherto suggested was the correct one was in fact incorrect. Sect. 26 of the Customs and Inland Revenue Act, 1885, expanding a long series of sections which are all recited and to all of

(1) [1893] 2 Q. B. 499.

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which we were referred, requires banks receiving certain income which may include dividends from foreign companies to do certain acts with regard to it with a view that the Inland Revenue shall receive its income tax on those sums, and it was stated very confidently that banks never deal, nor does the Inland Revenue, with a three years' average, but merely deduct income tax on the one year's sum that has been received. Now I have some familiarity with the practice, and I have carefully gone through the sections, and I am quite satisfied that that argument is founded on a complete misapprehension. The acts which the banks are required to do will be found in the Income Tax (Foreign Dividends) Act, 1842, s. 2; a bank is required to deliver to the Commissioners an account of the amount of dividends, whereupon the Commissioners are to make assessments, in that Act under Sched. C, but in a later Act (the Income Tax Act of 1853) under Sched. D; and then the bank is to deduct, in accordance with the assessment, the income tax. If the bank only returned one year's payment, what are the Inland Revenue Commissioners to do, assuming that it is a foreign dividend coming within case 5? They have rules provided for them; they are to act under the rules in case 1 for dealing with an average. If they have nothing to get an average from, as in case 1, if the business has been established within the three years or within the year of assessment, they are to deal with it by specified rules or under case 6; in either case on one year's receipts only. If the banks have only returned one year's receipts, the Commissioners have no option under the rules but to assess on one year's payments, and the banks must then deduct the assessment; but if the banks should, as they ought to do in regard to their customers' interests, return the receipts of the three previous years, the Commissioners will have no option but to follow the language of the statute and assess on the previous three years' average; if they do not, they will be striking the rules in case 5 out of the statute. It is very likely more convenient for the Commissioners not to make too many inquiries as to whether there were previous receipts. It is

much simpler for them to deal with it on the one figure which the banks return, but the fact that when they only get a return of one year they only assess on one year, which is quite in accordance with the Act, does not show in any way that the views which I have previously expressed, which have been sanctioned by Parliament, as to the three years' average applying to dividends from foreign shares, are in any way incorrect. The fact, therefore, is that the practice of the banks, assuming it to be exactly as stated by counsel for the appellant, appears to me to have no bearing whatever on the true construction of case 4 and case 5.

Two subordinate points were stated by Sir John Simon, but not more than stated. They are these : It was said that in the Act of 1914, when the Act provided that the tax should be assessed on the full amount of the income notwithstanding anything in the rules under case 4 and case 5 in s. 100, it left out, and required everyone dealing with the case to leave out, that part of the rules which dealt with average. In my view the words of the Act itself, "whether the income has been or will be received in the United Kingdom or not," show that what Parliament was dealing with was the question of received income as distinguished from full income, and that there was no intention to strike out the rest of the rules from the Act, which are alone the rules under which the Commissioners could proceed to assess at all.

The last point, which again was merely stated in a sentence without being argued with any vigour or conviction by Sir John Simon, is that if part of the income that you are to form an average from fell before April 6, 1914, you cannot bring it into the average on which you are computing the income of 1916. "Nothing in these provisions shall be construed so as to render liable under these rules to income tax for the current year income which was paid or became due before April 6, 1914." That, in my view, does not in any way preclude the income of the current year being computed in the way provided by an average of the three preceding years. You are not rendering that previous income liable for income tax in the current year ; you are only rendering the conventional income

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of the year 1916, or whatever the year may be, liable in accordance with the rules provided in the Act.

Appeal dismissed.

Solicitors for appellant: *Church, Rendell, Bird & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

G. A. S.

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March 27, 28; *April* 2.

[IN THE COURT OF APPEAL.]

WILLIAMS *v.* SINGER.

POOL *v.* ROYAL EXCHANGE ASSURANCE.

Revenue—Foreign Possessions—Dividends not remitted to United Kingdom—British Trustees of Foreign Beneficiaries—Liability to Income Tax—Finance Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 10), *s.* 5.

Where trustees hold shares in a foreign company on behalf of a foreign subject domiciled abroad, the fact that they themselves are domiciled and resident in the United Kingdom does not make them chargeable with income tax in respect of dividends on those shares not remitted to this country but paid direct to the beneficiary abroad.

Decision of Sankey J. [1918] 2 K. B. 749 affirmed.

TWO APPEALS from decisions of Sankey J. upon cases stated under s. 59 of the Taxes Management Act, 1880.

The decision on the first case is reported [1918] 2 K. B. 749, that on the second being unreported. Both appeals raised the same question, namely, whether trustees domiciled and resident in the United Kingdom, who held shares in a foreign company, on behalf of a foreign subject domiciled abroad, were liable to income tax in respect of dividends on the shares not remitted to this country, but paid direct to the beneficiary abroad.

The facts in the first case will be found stated in the report in the Court below. Those in the second were substantially the same, the only difference being that in the first case the parties assessed (the trustees were assessed individually

without reference to any trust, while in the second, the Royal Exchange Assurance were assessed "as trustees under the will of J. P. Mellor (deceased) for beneficiary, Mrs. H. P. Munthe."

In each case the income was derived from foreign securities or possessions, and no part of it had been or would be received in the United Kingdom. It arose abroad and was paid to or credited to the account of the beneficiary abroad. In each case the beneficiary was a foreign subject not domiciled or resident in the United Kingdom. The trustees however in each case were domiciled and resident in the United Kingdom.

The question for decision was whether the liability to income tax was to be determined by the domicil of the trustees or by that of the cestui que trust.

The Commissioners for Special Purposes of the Income Tax Acts decided in each case that the liability to income tax was determined by the domicil of the beneficiary and they discharged the assessments. Sankey J. took the same view, and in each case dismissed the appeal by the Surveyor of Taxes, who now appealed to this Court.

Sir Gordon Hewart A.-G. and *T. H. Parr* for the Crown. The point in these cases is whether the liability to income tax on profits of shares in a foreign company held under a British trust by trustees resident in the United Kingdom is to be determined with reference to the domicil and residence of the trustees or to that of the beneficiary. The trustees in each case are the legal owners of the property from which the profits arise. The liability to tax in respect of this class of property is imposed by s. 100 of the Income Tax Act, 1842, which provides that the duties under Sched. D shall be charged on and paid by "the persons . . . . receiving or entitled to the same." Under Case 5 the duty to be charged on shares in a foreign company ("foreign possessions") is to be computed on the actual sums annually received in Great Britain. That was altered by s. 5 of the Finance Act, 1914, which provides that the tax in such cases shall be computed "on the full amount of the income whether the

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income has been or will be received in the United Kingdom or not. . . . . Provided that this section shall not apply in the case of a person who . . . . is not domiciled in the United Kingdom." The question is whether a beneficiary not domiciled in this country is entitled to the benefit of that proviso. Sect. 5 is not an assessing section, it only measures or alters the quantum of the assessment by bringing in profits which have not been remitted to this country, it does not alter the basis of the assessment or the person who is to be assessed. It is said that, admitting the trustees are assessable as legal owners of the property, the liability of the beneficiary to pay the tax is cut down by the proviso. That is a misreading of the proviso. The "person" in the proviso is the person liable to be assessed—i.e., in these cases the trustees. The circumstances of residence and domicil to be considered are those of the trustees and not of the beneficiary. There is nothing unfair in imposing the tax upon a non-resident foreigner who is enjoying the benefit of protection under a British trust: *Attorney-General* v. *Jewish Colonization Association*. (1) The Courts of this country have not been reluctant to make persons who benefit under English trusts liable to duty. When property is held in trust the person receiving and entitled to the income is the trustee, and not the beneficiary. It is with the trustee who is the owner of the trust fund that the Income Tax Acts are concerned. See s. 71 of the Finance Act (1909–10), 1910 (10 Edw. 7, c. 8), and s. 13 of the Revenue Act, 1911 (1 Geo. 5, c. 2), and observations of Lord Wrenbury in *Drummond* v. *Collins*. (2) See also *Fry* v. *Shiel's Trustees* (3) and *Rex* v. *Newmarket Income Tax Commissioners*. (4) It is the trustees who are assessable under Sched. A of the Act of 1842. The practice of the Inland Revenue authorities has never been questioned since 1842.

[SWINFEN EADY M.R. In the second of these two cases under appeal the Royal Exchange Assurance are expressly assessed as trustees of the beneficiary.]

(1) [1901] 1 K. B. 123.
(2) [1915] A. C. 1011, 1020.
(3) (1914) 6 Tax Cas. 583.
(4) [1916] 1 K. B. 788.

That was for the purpose of identifying the property in respect of which they were assessed.

Sect. 41 of the Act of 1842 provides no doubt that "any person not resident in Great Britain, whether a subject of Her Majesty or not, shall be chargeable in the name of such trustee," from which it might be assumed that it is the beneficiary and not the trustee who is prima facie to be assessed. But that section is not concerned with the person who is assessable; it is mere machinery: *Tischler* v. *Apthorpe* (1); *Werle & Co.* v. *Colquhoun.* (2)

The section refers to a class of trustees in whom the legal interest in the trust funds is not vested, for the word "trustee" is associated with "any factor agent or receiver having the receipt of any profits or gains." In such a case either the foreign beneficiary or principal, if he can be got at, or the agent in this country may be assessed. That section is not material to the present case. It is submitted that both appeals should be allowed.

Disturnal K.C. and *Latter* for the respondents in *Williams* v. *Singer.*

It is admitted that before 1914 it would have been impossible to tax these profits at all, as they were not remitted to nor received in this country. But it is said there is something in the Act of 1914 which renders them liable to tax. It is conceded that s. 41 of the Act of 1842 is pure machinery to be resorted to where the person entitled to the income cannot be reached, as for instance where he is resident abroad. In 1842 the position of a married woman was very different. She could not then have the legal ownership of property. Machinery was necessary to reach it for purposes of taxation in the hands of her trustee. The only kind of trustee aimed at by s. 41 is the trustee who has the "direction controul or management of the property" of a person under disability, such as a married woman, and he is rendered chargeable to the same duties as the married woman would have been if she had been sole. In this case the beneficiary, even if she were resident in Great Britain, would not be liable to be charged.

(1) (1885) 2 Tax Cas. 89, 93. (2) (1888) 20 Q. B. D. 753, 760.

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Sect. 53 of the Act of 1842 is perfectly general, and shows how and why the trustee is charged. By the form of the assessment in *Pool* v. *Royal Assurance* the Commissioners have deliberately adopted s. 53. The trustees are sought to be charged on account of the person beneficially interested. Neither *Fry* v. *Shiel's Trustees* (1) nor *Rex* v. *Newmarket Income Tax Commissioners* (2) affect the point in this case.

[They also referred to *Colquhoun* v. *Brooks*. (3)]

Bremner (*Disturnal K.C.* with him) for the respondents in *Pool* v. *Royal Exchange Assurance*.

The person charged in this case is the beneficiary, Mrs. Munthe, as is shown by the form of the assessment. She not being domiciled in the United Kingdom, comes within the proviso to s. 5 of the Act of 1914, and the assessment is therefore wrong. The fact that she has trustees in this country does not exclude her from the benefit of the proviso. The person chargeable is the person who pays the tax, that is the beneficiary, Mrs. Munthe, who pays it by deduction (*Brooke* v. *Inland Revenue Commissioners* (4)); and see s. 6 of the Act of 1914 and s. 8 of the Finance Act, 1898. Much of the income tax is paid by deduction.

The notion that the Crown looks only to the legal owner is unfounded: *Drummond* v. *Collins*. (5) The beneficiary is the person to be taxed when he can be got at. But where he is not liable by reason of his not being domiciled in this country he cannot be got at through trustees who are so domiciled. Again this assessment is plainly made under s. 41 of the Act of 1842. Under that section the liability of the trustee is limited to that of the beneficiary, which is quite reasonable, and s. 42 points in the same direction. Sect. 41 regards the non-resident beneficiary as the person to be charged, but he is charged in the name of the trustee. If he be resident he is charged in his own name. See also s. 44. All this is contrary to the contention of the Crown that they regard the legal owner only and not the beneficiary.

(1) 6 Tax Cas. 583.
(2) [1916] 1 K. B. 788.
(3) (1889) 14 App. Cas. 493, 503.
(4) [1918] 1 K. B. 257.
(5) [1915] A. C. 1011.

The object of these machinery sections is to facilitate collection. They are not charging sections at all.

Parr in reply.

Sect. 41 does not cover this case. Its language restricts its scope to the case of representative persons who act for others but form a class of trustees or agents who in no case can own the property, and in no case are entitled to the profits. Sect. 42 and the following sections are provisoes dealing with the same limited class of representatives mentioned in s. 41 : *Lord Advocate* v. *Gibb.* (1)

[He also referred to Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 6; Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 31; and Finance Act, 1917 (7 & 8 Geo. 5, c. 31), s. 14.]

Cur. adv. vult.

April 15. SWINFEN EADY M.R. (after stating the facts and saying that in his opinion the difference in the form of the assessment in the two cases was unimportant). Before the passing of the Finance Act, 1914, no income tax would have been payable on the income in question, as no part of it was actually received in Great Britain. The question turns upon the true construction of s. 5 of the Finance Act, 1914, which imposes income tax on the income "arising from securities, stocks, shares, or rents in any place out of the United Kingdom," whether the income has been or will be received in the United Kingdom or not. The section however contains the following proviso : "Provided that this section shall not apply in the case of a person who satisfies the Commissioners of Inland Revenue that he is not domiciled in the United Kingdom, or that being a British subject he is not ordinarily resident in the United Kingdom." It is beyond dispute that if the respective beneficiaries entitled to this income were here, they could not be assessed to income tax in respect of this income, no part of which reaches the United Kingdom.

The contention on behalf of the Surveyor of Taxes is that the Income Tax Acts have regard only to the legal owners

(1) (1906) 5 Tax Cas. 194.

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of property and disregard the persons equitably or beneficially entitled, and that if the legal owners are domiciled here, it is immaterial that they are merely trustees for persons not domiciled here. On the other hand the respondents insist that the notion that for purposes of income tax the Commissioners look only to the legal owner is wholly unfounded. Sect. 5 of the Finance Act, 1914, provides for the taxation of income from foreign property, but does not contain any particulars of the person to be charged. It is necessary to consider the previous Income Tax Acts to determine this question. The charging section is s. 2 of the Act of 1853, Sched. D: "For and in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever, whether situate in the United Kingdom or elsewhere."

The contention on behalf of the Crown is that a trustee for a foreigner domiciled abroad, is a "person" within this Sched. D, and has to be assessed as well in respect of his own property as in respect of property held as trustee for others, without reference to the trust. If this be so, super-tax will have to be assessed in the same way, and the larger the aggregate income the higher the rate of super-tax, up to the maximum limit. Thus a cestui que trust of limited means would suffer by having a wealthy trustee. Nor can it be urged that this is merely form, and that the cestui que trust can obtain such exemption relief or abatement as the nature of the case may require under s. 6 (3.) of the Finance Act, 1914; as by s. 71 (1.) of the Finance (1909–10) Act, 1910, no exemption, abatement, or relief under the Income Tax Acts, which depends on the total income of an individual from all sources shall be given to any person, unless the person claiming the exemption abatement or relief is resident in the United Kingdom.

Again it is not true to say that the Income Tax Acts look only to the legal owners, as they contain references to persons who pay income tax either by way of deduction or otherwise. A person who pays income tax by deduction is a taxpayer: *Brooke* v. *Inland Revenue Commissioners.* (1)

(1) [1918] 1 K. B. 257.

The case of *Colquhoun* v. *Brooks* (1) established that notwithstanding the wide language of the charging sections of the Income Tax Acts, it is open to the subject to show that having regard to the machinery of the Act for assessing and collecting, the language was not intended to bear the widest meaning, so as to operate unreasonably in the case of foreigners. Sect. 41 of the Act of 1842 provides for the trustees and guardians of certain incapacitated persons being chargeable to the duties imposed in like manner and to the same amount as would be charged if such persons were capable of acting for themselves. This is merely machinery for the purpose of collecting the duty. It was argued for the Crown that this section did not extend to a case in which a trustee was legal owner, and was merely inserted in the statute to include cases where a trustee, not being legal owner, nevertheless had "the direction, controul, or management." This contention, however, is not well founded. A trustee for a married woman is a person who is usually the legal owner of the property to which the married woman is beneficially entitled. I am of opinion that the view expressed by Mr. Justice Sankey was well founded, and that s. 41 is mere machinery by which a person who is liable for income tax can be reached through the trustee or other persons mentioned in the section. The residence of the trustee is not a determining factor to render liable to income tax a person who would not otherwise be liable, or through the medium of a trustee to render income liable to tax which would not be so liable in the hands of the beneficiary himself. The income in question does not in my opinion fall within "annual profits or gains accruing to any person residing in the United Kingdom" within the meaning of Sched. D. This income accrues to a foreigner residing abroad, and the fact that there are English trustees residing here does not bring this income into charge.

Take the converse case of income arising from property abroad, remitted by a foreign trustee to a beneficiary resident here. Such a beneficiary would certainly be liable to be taxed here on the income received in the United Kingdom

(1) 14 App. Cas. 493.

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and could not escape from payment upon the ground that the profits or gains did not "arise or accrue to any person residing in the United Kingdom," but arose or accrued to the trustee residing abroad, who was the legal owner of the foreign property.

I am of opinion that the proviso in s. 5 of the Act of 1914 extends to exempt a beneficiary not domiciled in the United Kingdom, and that the income of such a person, obtained from property abroad, and no part of which ever reaches the United Kingdom, is not liable to income tax by reason only of one or more of the trustees being domiciled and resident here. In my opinion both appeals fail, and should be dismissed with costs.

WARRINGTON L.J. These are two appeals by the Commissioners of Inland Revenue from orders of Sankey J. on cases stated by the Commissioners of Income Tax; they were heard together, the facts in the two cases being, so far as material to the question for decision, the same, with one possible exception, which I will refer to hereafter.

In each case the income sought to be taxed arises from stocks and shares of foreign companies. These stocks and shares are vested in trustees resident in the United Kingdom, and these trustees are therefore legally entitled to the income. The beneficiary, however, in each case is not domiciled in or resident in the United Kingdom. No part of the income in either case has been received in the United Kingdom, the whole of it being paid to the beneficiary in the foreign country where she resides. The Commissioners claim to charge the trustees with duty as the persons legally entitled to the income, leaving them to retain or recover the amount from their beneficiary, who would thus be made ultimately liable to pay the tax.

In *Pool* v. *Royal Exchange Assurance* the assessment was made upon the trustees "as trustees under the will of J. P. Mellor (deceased) for beneficiary Mrs. H. P. Munthe." In the case of *Williams* v. *Singer* it was made against the trustees simply without reference to their character as trustees

or to their beneficiary. In the view I take this difference in the facts is immaterial. Before the Finance Act, 1914, the income in question, not being received in the United Kingdom, would not have been subject to tax. By s. 5 of that Act, however, it is enacted as follows. [The Lord Justice read the section and continued :] There is no dispute that each of the beneficiaries satisfies the conditions there laid down. The Commissioners, however, contend that if, as they insist, the trustees as the legal owners of the income are liable to be charged, they are the only persons referred to in the proviso and they are domiciled in the United Kingdom and therefore not protected by the proviso.

It is to be observed that s. 5 of the Act of 1914 deals only with the income to be charged and not with the persons who are to be made liable to pay. Who they are still depends on the Income Tax Acts of 1842 and 1853. The present charging section is s. 2 of the Act of 1853, and the material provision is that contained in the first branch of Sched. D, which refers to the duty "for or in respect of profits and gains arising or accruing to any person residing in the United Kingdom." Is a trustee residing in the United Kingdom liable to be taxed on gains and profits accruing to him in which he has no beneficial interest ? In my opinion the provisions contained in the sections dealing with trustees in the Act of 1842 show clearly enough that the person liable to be taxed is the beneficiary and not the trustee, and that the provisions of s. 41 are mere machinery by which, in the cases there specified, the tax may be the more readily recovered. See Mathew J. in *Tischler* v. *Apthorpe* (1), whose opinion on this point was adopted by all the judges in the Court of Appeal in *Werle & Co.* v. *Colquhoun.* (2) The first part of s. 41 provides that the trustee amongst other persons of any person being an infant or married woman, lunatic, idiot, or insane having the direction control or management of the property or concern of such infant etc. shall be chargeable to the said duties in like manner and to the same amount as would be charged if such infant were of full

(1) 2 Tax Cas. 89. (2) 20 Q. B. D. 753.

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age or such married woman were sole or such lunatic, idiot, or insane person were capable of acting for himself. It is therefore the liability of the beneficiary which is to govern that of the trustee, and by s. 44 trustees are authorized to retain the duty as against the beneficiary. It has been contended that the words "having the direction" and so on indicate that the section is not dealing with a trustee in whom the property is vested. I can see no reason for so limiting its application. The second part of the section deals with the case of a person not resident in Great Britain, and provides that he is to be chargeable in the name of such trustee, guardian, tutor, curator, or committee, or of any factor, agent, or receiver having the receipt of any profits or gains arising as in the Act mentioned and belonging to such person in the like manner and to the like amount as would be charged if such person were resident in Great Britain and in the actual receipt thereof. Finally it is provided that every trustee, and so on, shall be answerable for the doing of all such acts matters and things as shall be required to be done by virtue of the Act in order to the assessing of any such person to the duties granted by the Act and paying the same. It is the person entitled to the income who is to be charged, but in the name of the trustee, etc. It is to be observed that the section makes no provision for assessing a trustee for a person not under disability and resident in this country.

The inevitable conclusion in my opinion is that the person contemplated by the Act as the taxpayer is the beneficiary and not the trustee.

I now turn to the proviso to s. 5 of the Act of 1914 and consider who in the light of the conclusion so far arrived at is the "person" so referred to. The object obviously is to exempt that person from taxation to which he would otherwise be liable. Was it intended to exempt a trustee only, who would not be liable, or to extend the exemption to a beneficiary on whom the liability would ultimately fall? The latter must, in my opinion, be the true meaning. The exemption extends only of course to tax upon income not

received in the United Kingdom. As to income so received, the matter remains governed by the provisions of the Income Tax Acts, 1842 and 1853.

I am of opinion that both appeals fail and must be dismissed.

SCRUTTON L.J. These are two cases raising substantially the same question: whether a cestui que trust not domiciled, or if a British subject not ordinarily resident in the United Kingdom, is liable to bear the burden of English income tax on the full amount of income derived from trust funds abroad, though not remitted to or received in the United Kingdom, and is liable because his trustees, who are the legal owners of the trust funds, reside in the United Kingdom. The only material difference in the two cases is that in the *Royal Exchange Case* the Commissioners of the City of London assessed the trustees "as trustees under the will of M. for beneficiary Mrs. Munthe," and in *Singer's Case* the New Sarum Commissioners assessed the trustees in their own name simply without reference to any beneficiary.

The question turns in the first instance on the meaning of a proviso in the Finance Act, 1914, s. 5. Before that Act an assessment under Sched. D would be made "in respect of the annual profits or gains arising or accruing to any person residing in the United Kingdom from any kind of property whatever whether situate in the United Kingdom or elsewhere." Such profits or gains if shares in foreign companies would be assessable under Case 5 as "foreign possessions" on the full amount of the annual sums actually received in Great Britain on the average of the three preceding years. This resulted in certain English owners of foreign possessions though resident in England bringing home only part of their profits and leaving the rest to accumulate abroad. In 1914 the Legislature dealt with this by providing that income tax in respect of securities shares or rent in any place out of the United Kingdom should, notwithstanding anything in the fourth case—(foreign securities), or fifth case (foreign possessions)—be computed on the full amount of the income whether the income had been or would be received in the

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United Kingdom or not. They provided that the full income should be subject to a deduction on account of any annual interest or any annuity or other annual payment payable out of the income to a person not resident in the United Kingdom, and added the following proviso : " Provided that this section shall not apply to the case of a person who satisfies the Commissioners that he is not domiciled in the United Kingdom or that being a British subject he is not resident in the United Kingdom." The Crown counsel point out, I think rightly, that this proviso has a wide operation apart from any question of trustee and cestui que trust. Amongst other effects, it at any rate relieved a foreigner residing in the United Kingdom, but not domiciled there, from paying on all his foreign income though not remitted to this country. It gave the same relief to a British subject not ordinarily resident in the United Kingdom, for instance, a Colonial visitor, as to his property out of the United Kingdom, even though his domicil was in the United Kingdom, as, e.g., a domicil of origin.

The question in this case is what is the effect of the proviso as applied to trustee and cestui que trust. If the trustee is resident in the United Kingdom, but the cestui que trust is not domiciled there, can the trustee escape assessment on the whole income ? If the cestui que trust is resident in the United Kingdom, but the trustee is not domiciled there, can the cestui que trust escape assessment on his whole income as distinguished from the part received in England ? For it seems clear that if the exemption does not apply by reason of the absence of domicil or ordinary residence of the " person," the old law applies, and if resident in the United Kingdom the " person " is taxable on his receipts from foreign possessions, subject to the exemption of temporary residents from tax on foreign possessions contained in s. 39 of the Act of 1842.

Before the Act of 1914 in my view a cestui que trust resident in the United Kingdom and receiving remittances from property abroad the legal estate in which was vested in a trustee abroad would be taxable on his receipts, and could not be heard to say he was not entitled in law but only in equity to the remittance. How would the converse case of the

trustee resident here with his cestui que trust abroad be dealt with? If he did not receive remittances here but ordered them to be sent direct to the cestui que trust abroad, he clearly would not be taxable; there would be no receipts here. But if he received remittances here, what was his position? The Crown counsel said it was quite simple; he was under Sched. D a person residing in the United Kingdom to whom profits and gains accrued from property abroad which he owned, and it was quite immaterial that he was not the beneficial owner. The subject replied that it was always admissible to show by the assessing and collecting machinery provided, that wide words in the taxing schedule had not their widest meaning (see *per* Lord Herschell in *Colquhoun* v. *Brooks* (1)), and this they endeavoured to do by certain sections relating to the assessing of trustees. In the case of trustees receiving in England income from foreign possessions to which others were beneficially entitled before the Act of 1914 Parliament thought it necessary expressly to provide by s. 108 of the Act of 1842 that such trustees should be charged for the same "whether the person to whom the said profits belong shall be resident in England or not." This looks as if the Legislature treated the cestui que trust as the person to whom the profits belonged and did not consider the trustee a person to whom profits accrued from property. The earlier sections appear to support this view. Sect. 41 of the Act of 1842 deals with two classes of people to be charged instead of others who cannot easily be reached. First, the representatives of incapacitated persons, infants, married women and persons of unsound mind. This class of representatives begins with "trustees," and continues "guardian, tutor, curator or committee." These last four persons have not the legal property in them, and the property is spoken of as the property of the infant lunatic, etc. But the trustee of the married woman may have and generally has the legal estate, yet the property is spoken of as the property of the married woman. It is provided that this class of trustees, etc., shall be chargeable in like manner as if the incapacitated persons were of full

(1) 14 App. Cas. 503.

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capacity. The second class dealt with by the section is persons not resident in Great Britain, who are to be chargeable in the name of "such" trustees, etc., apparently a trustee "having the direction control or management of their property, or in the name of any agent in receipt of any profits or gains 'arising as herein mentioned and belonging to such person.'" This again treats the property from which the trustee manages or receives profits as agent, as the property of the cestui que trust; and every such trustee shall be answerable for the doing of all acts required to be done "in order to the assessing of any such person."

Sect. 42 is puzzling. Its apparent wording would free a trustee who authorizes a non-resident cestui que trust to receive the profits of English trust property from any other liability except to give the name and residence of such person, the condition "and residence in Great Britain" being limited to persons who have agents or receivers. But in view of the express terms of ss. 41, 51 and 53 this can hardly be so, and the section must be limited to trustees of persons resident in Great Britain who need only to give the cestui que trust's name.

Sect. 44 begins: "Where any person being trustee . . . . for any person shall be assessed under this Act in respect of such person," and authorizes him to retain sufficient of the trust funds to pay the assessment. Intermediate sections provide for assessment and obtaining the information necessary for assessment, and then s. 51 provides that any person (A) who is in receipt of profits "of or belonging to any other person" (B), in whatsoever character the same shall be received, for which such other person (B) would be chargeable if he resided in Great Britain shall give information in the prescribed form, including the name and place of abode of any "person (B) to whom the same shall belong" in order that such person (B) may be charged either in the name of the person (A) delivering the list, or in the name of the person (B) to whom such property shall belong, if of full age and resident in Great Britain." The prescribed form is contained in s. 190 (Sched. G), xvi., and is to include "List

to be delivered by every trustee . . . . of the name and residence of the person for whom they act in such character, and the names of those who are joined in trust. . . . . Declaration on whom the duty is chargeable in respect of such trust." Sect. 53 provides that every person (A) who shall act in any character as aforesaid (which includes a trustee for any other person) (B), who by reason of incapacity or non-residence in Great Britain cannot be personally charged shall deliver a statement of the amount of profits and gains to be charged on him (A) on account of such other person (B). Sect. 55 deals with trustees delivering imperfect lists "on behalf of any other person." Sect. 170 provides that any trustee or person acting in any of the characters hereinbefore described may claim exemption on account of others. By s. 71 of the Finance Act, 1910, no exemption shall be given to any non-resident with certain exceptions. The Crown counsel were asked how they proposed to deal with the case of a trustee whose own income would entitle him to exemption or a lower rate of duty, though if the income he received as trustee were added to it, he would pay a higher rate. They made the startling answer that the two incomes would be added together and the rate fixed by the total sum, and that then the trustee and cestui que trust might get back such part as they could, which in the case of a non-resident cestui que trust would be nothing, though he had paid an added rate because of the added income of his trustee.

The conclusion I draw from these involved sections is that Parliament was endeavouring to put the burden on the beneficial owner, and only used the trustee as machinery to get at the person who had the benefit of the income. The trustee was only to be assessed "in respect of" the cestui que trust (s. 44), "on account of such other person" (s. 53), "on behalf of the other person" (s. 55). The person to whom the property belongs is to be charged in the name of the trustee (s. 51). The assessment by the very experienced Commissioners for the City of London, "as trustees for beneficiary" is in accordance with this view. It follows that in my opinion when Parliament exempted a class of

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persons from the operation of the statute of 1914, s. 5, they were at any rate including the beneficial owner or cestui que trust, if he came within the description of the class. The cestui que trust in each of the present cases is not domiciled in England and therefore in my view comes within the protection of the proviso and is not bound to pay on her whole income but only on that part which her trustees receive in England. The word "person" in the proviso in my view includes a beneficial owner or cestui que trust who can satisfy the requirements of the proviso. I am not certain that the same result might not be arrived at by treating the payment to the cestui que trust as an annual payment out of the income to a person not resident in the United Kingdom under the earlier part of s. 5, but in view of the difficulties about "other annual payments" discussed and to be decided in *Lord Howe's Case* (1), I prefer not to rest my decision on this ground.

Both appeals must be dismissed with costs.

Appeals dismissed.

Solicitors: *Solicitor of Inland Revenue; Charles Russell & Co.*

(1) Post, see Table of Cases; W. N. [1919] 126.

G. A. S.

[IN THE COURT OF CRIMINAL APPEAL.]

REX *v.* SHEPHARD.

1919
March 31.

Criminal Law—Murder—Incitement to—Unborn Child—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 4.

By s. 4 of the Offences against the Person Act, 1861, "whosoever shall solicit, encourage, persuade, or endeavour to persuade, or shall propose to any person, to murder any other person . . . . shall be guilty of a misdemeanour":—

Held, that for the purposes of that section it is not necessary that the person to be murdered should be in existence at the date of the incitement; it is enough that he is in existence at the time when the act of murder is to be committed.

The appellant wrote to a woman, who was then pregnant, soliciting her to kill her child when it was born. The child was in due course born alive:—

Held, that the child, having been born alive, the incitement to murder it was an incitement to murder a "person" within the meaning of the section notwithstanding that at the date of the incitement it was incapable of being the subject of murder, and that the appellant was rightly convicted of an offence under the section.

Quaere, whether he could have been so convicted if the child had been born dead?

APPEAL to the Court of Criminal Appeal.

On September 20, 1917, the appellant wrote to one Cicely Maria Shephard, who was then about six weeks gone with child, a letter in which he said: "When the kiddie is born you must lie on it in the night. Do not let it live." The child was born alive on May 31, 1918. In March, 1919, the appellant was convicted at the Central Criminal Court on an indictment which charged him with having "on September 20, 1917, solicited and endeavoured to persuade Cicely Maria Shephard thereafter to murder a newly born child lately before then born of her body." The indictment was framed under s. 4 of the Offences against the Person Act, 1861. The appellant appealed against his conviction, on the ground that the incitement to kill contained in the said letter was not an offence against the section.

Werninck for the appellant. To constitute the offence

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of inciting to murder dealt with by the Act of 1861 there must be "a person" capable of being murdered in existence at the date of the incitement. Here there was no such person; the child was unborn. The statute was not intended to apply to the contingency of the person to be murdered coming into existence at a future date. It may be, as stated in Hawkins' Pleas of the Crown, 7th ed., Bk. I., ch. 31, s. 17, that "where one counsels a woman to kill her child when it shall be born, who afterwards does kill it in pursuance of such advice, he is an accessory to the murder," but he cannot be convicted of an incitement to murder where the advice is not followed. In such a case the coming into existence of the child does not relate back to the date of the advice given.

Travers Humphreys for the Crown was not called upon.

The judgment of the Court (Bray, Lawrence, and Shearman JJ.) was delivered by

BRAY J. In this case the appellant was convicted on a count framed under s. 4 of the Offences against the Person Act, 1861, which makes it an offence to solicit any person to murder "any other person." The appellant undoubtedly did solicit the woman Shephard to murder her child if and when it should be born, and the question is whether the case falls within the section having regard to the fact that at the date when the letter containing the solicitation was written the child was unborn and therefore could not be the subject of murder. We must look at the matter from a common-sense point of view, and, so looking at it, we cannot entertain a doubt that it does. All that is essential to bring a case within the section is that there should be a person capable of being murdered at the time when the act of murder is to be committed. If there is such a person then in existence it is quite immaterial that that person was not in existence at the date of the incitement. Here the child was in fact born alive, so that the event happened upon which the act was to be done. That is enough to satisfy the section. We do not decide whether the appellant could have been convicted if the child had not been born alive. It is not necessary to

decide that. In the event which has happened the appellant was properly convicted and the appeal must be dismissed. 1919 REX v. SHEPHARD.

Appeal dismissed.

Solicitor for the appellant: *A. E. Cubison.*
Solicitor for the Crown: *Director of Public Prosecutions.*

J. F. C.

DUNLOP BROTHERS & COMPANY *v.* TOWNEND.

1919
April 3, 4.

[1919 D. 825.]

Insurance (Marine)—Floating Policy—Subject-matter insured designated in general Terms—Interest of Consignees intended to be covered—Instructions by Shippers to insure with other Underwriters—Limitation of Interest of Consignees—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *ss.* 26, 29.

By s. 26, sub-s. 3, of the Marine Insurance Act, 1906, "where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered":—

Held, that as the terms "subject-matter" and "interest" were used together in the section, the word "interest" must be construed in its stricter sense as meaning the nature of the interest which the assured has in the subject-matter of the insurance, and not in its looser sense as indicating the subject-matter of the insurance.

The plaintiffs, who were the agents for the sale in this country of the goods of certain firms in the East, effected a floating policy at Lloyds, the interest intended by the plaintiffs to be covered being their interest as consignees of the goods in respect of selling commission and advances made by them against the goods shipped. The subject-matter insured was described as "produce and/or merchandise," and the insurance was against war risks only. The plaintiffs made declarations under the floating policy of all consignments of goods within the term of the policy except such consignments as they were instructed by their shippers to insure against war risks under the Government scheme of war risks insurance and not under the floating policy. Certain goods were lost by war perils in regard to which the plaintiffs made a declaration under the policy. If, however, the plaintiffs were bound to make declarations of all the goods consigned to them without regard to the instructions of the shippers the floating policy had previously run off:—

Held, that as the subject-matter insured was designated in the policy in general terms the interest of the plaintiffs which was covered by the policy was under s. 26, sub-s. 3, of the Marine Insurance Act, 1906,

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the interest which was originally intended by the plaintiffs to be covered, and that it was not affected or limited by the instruction of the shippers with regard to insurance; that as the consignments which the plaintiffs were instructed not to insure under the policy were consignments within the terms of the policy the plaintiffs were bound under s. 29, sub-s. 3, of the Marine Insurance Act, 1906, to make declarations of such goods, and that accordingly the policy had run off.

PRELIMINARY QUESTION of law tried before Bailhache J. in the Commercial Court.

The plaintiffs, Dunlop Bros. & Co., on June 19, 1916, effected a floating policy at Lloyds for 2000*l.* upon produce and/or merchandize to be thereafter declared and valued as per marine policy from various ports in the East to any ports in the United Kingdom. The risks covered by the policy were those excluded by the f.c. and s. clause, including mines and torpedoes. This policy was underwritten by the defendant and other underwriters.

On October 27, 1917, the plaintiffs duly declared against the policy a shipment of 770 cases of raisins from Bombay for Liverpool per s.s. *Karema*, the proportion of the value thereof attaching to the policy being 1665*l.* The *Karema* was sunk on November 25 while on the voyage to Liverpool by enemy action and the cases of raisins lost.

The plaintiffs sued the defendant upon the policy to recover from him his proportion of the sum of 1665*l.* as and for a total loss of the goods, alleging that they were interested to the full extent under the policy.

The defendant by his defence did not admit that the plaintiffs were interested in the policy as alleged, or that the insurance was intended to cover such alleged interest. The defendant also said that prior to the declaration of October 22, 1917, there were many other consignments covered by the policy which should have been declared thereon and which if they had been so declared would have exhausted the policy.

The plaintiffs delivered particulars of the interest intended to be covered by the floating policy as follows: "The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the

terms of the policy) advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the Government scheme of war risks insurance."

The question of law raised on the plaintiffs' particulars, namely, as to whether the plaintiffs were entitled to exclude from the declarations to be made under the policy shipments in respect of which they had been instructed by the shippers to insure under the Government scheme of war risk insurance, was ordered to be tried as a preliminary question.

It was admitted that if the plaintiffs were bound to make a declaration of all the goods which came forward, including the goods they were instructed to insure under the Government scheme of war risks insurance, the floating policy had run off and that their claim failed.

Leck K.C. and *Raeburn* for the plaintiffs. The plaintiffs made declarations of all the ships they were under an obligation to declare. The interest insured by the policy, which is in general terms, was the interest intended by the assured to be covered: *Stephens* v. *Australasian Insurance Co.* (1); *Scott* v. *Globe Marine Insurance Co.* (2); Marine Insurance Act, 1906, s. 26, sub-s. 3. In *Reliance Marine Insurance Co.* v. *Duder* (3) the loss fell directly within the terms of the policy, and where the loss is clearly covered by the policy evidence of the intention of the assured is excluded, but there is nothing in that decision which restricts the operation of s. 26, sub-s. 3, of the Act of 1906. Therefore if, as in the present case, the consignees of goods require to insure by a floating policy only a portion of the goods consigned to them, and the policy is in general terms covering all the goods consigned to them, the question arises as to what the consignees intended to insure. They are not bound to declare goods which they did not intend to insure.

Wright K.C., and *Simey* for the defendants. Assuming that

(1) (1872) L. R. 8 C. P. 18. (2) (1896) 1 Com. Cas. 370.
(3) [1913] 1 K. B. 265.

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the plaintiffs had an insurable interest as consignees in respect of every one of the consignments they were not entitled to declare some only of the consignments under the policy. Sect. 29, sub-s. 3, says that "unless the policy otherwise provides, the declarations must . . . . in the case of goods, comprise all consignments within the terms of the policy." The goods which were consigned to the plaintiff were goods coming within the terms of the policy which did not contain any provision limiting the declarations which had to be made under the policy, therefore declarations ought to have been made of all the consignments. Any limitation as regards declarations of consignments within the terms of policy if not contained in the policy must be communicated to the underwriters; the only thing that need not be communicated is the nature and extent of the interest of the assured in the subject-matter insured.

BAILHACHE J. In this case the plaintiffs sue an underwriter upon a floating policy of marine insurance dated June 10, 1916, in respect of the loss of a number of cases of raisins. The policy describes the subject-matter of the insurance to be "produce and/or merchandise," and it is insured from certain ports in the East to the United Kingdom against war risks only. The reason for that is that the marine risks were covered on the other side, but it was not convenient to cover the war risks in the East, so that that was done in London.

The case comes before me upon a question of law on the assumption that certain particulars delivered by the plaintiffs in this case are correct. Those particulars are as follows: "The plaintiffs' interest was as consignees for sale in respect of selling commission, advances made or to be made and drafts accepted or to be accepted against shipments (within the terms of the policy) advised or made to them from time to time, save as to such shipments as the plaintiffs should be instructed by the shippers (whose instructions, if given, they were bound to carry out) to insure under the Government scheme of war risks insurance." The point to be determined really turns on the last words "save as to such shipments

as the plaintiffs should be instructed by the shippers (whose instructions if given they were bound to carry out) to insure under the Government scheme of war risks insurance." It arises in this way. The plaintiffs are the agents of certain people in the East for the sale of their goods in this country. The goods were shipped to the plaintiffs who made advances from time to time in respect of the goods, and therefore the plaintiffs were interested in their safe arrival by reason of the selling commission which they would make if they arrived and of the advances which they made against them before arrival. The plaintiffs took out this floating policy with reference to those goods. They declared under this floating policy all the goods which came within the terms of the policy except such goods as they were instructed by their principals in the East to insure against war risks under the Government scheme of war risks insurance, and not under this policy. The question to be determined in this case is whether the plaintiffs were justified in failing to make declarations under this floating policy in respect of those consignments which they were instructed by their principals to insure against war risks under the Government scheme, that arrangement not having been communicated to the underwriters on this policy. It is agreed that if the plaintiffs were bound to make declarations of all the goods which came forward to them as consignees irrespective of whether they were instructed to insure them under the Government scheme or not the floating policy had run off and the claim fails. It is upon those assumptions and under those circumstances that the case comes before me to be tried to-day.

When a floating policy on goods is taken out the assured contemplates that goods will be coming forward in which he or the person on whose behalf he takes out the floating policy will, at any rate at the time of the loss, have an insurable interest. The floating policy might be taken out because of an insurable interest which the assured himself has in the goods or because of the insurable interest of other persons on whose behalf the floating policy is taken out.

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Insurable interests are of many kinds. The most obvious and most complete is the insurable interest of an owner in goods, but from that full and complete interest down to the smallest interest that can be covered by insurance there are many varying degrees of insurable interest. It is sufficient that the person on whose behalf the policy is taken out has some pecuniary interest which would be safeguarded by the safe arrival of the goods, and be injured by the failure of the goods covered by the floating policy, to arrive.

Under the Marine Insurance Act, 1906, it is not necessary that the interest which the assured intends to insure should be declared to the underwriter. That is provided by s. 26, sub-s. 2, which is in these terms: "The nature and extent of the interest of the assured in the subject-matter insured need not be specified in the policy." Then sub-s. 3 provides that "where the policy designates the subject-matter insured in general terms, it shall be construed to apply to the interest intended by the assured to be covered." Sub-s. 3 has been the subject of a good deal of judicial criticism on the ground that it is difficult to understand. I think the chief difficulty about it is due to the fact that the word "interest" is very often used in marine insurance in two senses. It is very often used to mean the nature of the interest which the assured has in the subject-matter of the insurance, and it is also often used in the looser sense to indicate the subject-matter of the insurance itself. When however the same section of an Act of Parliament contains the word "subject-matter" and the word "interest" used together it seems to me quite clear that the word "interest" must be construed in its stricter and proper sense. I think that sub-s. 3 means that where the policy designates the subject-matter insured in general terms, as for instance in this case, merchandise, it shall be construed to apply to the interest, that is to say, the pecuniary or insurable interest intended by the assured to be covered, whether that interest be that of owner or whether it be that of a person who has made advances, or of a person who is interested in the safe arrival of the goods by reason of the commission which he shall get on the sale, and

of course the policy applies to a case where a person takes out a floating policy not to cover any pecuniary interest of his own but to cover the liabilities and interest of persons on whose behalf he is instructed to insure. That interest need not be declared, but the law is that the policy shall only cover the interest which it is intended to cover. An illustration of the extent to which a floating policy with no declared interest may be extended to cover the interest intended to be covered is to be found in *Stephens* v. *Australasian Insurance Co.* (1) An illustration showing how strictly a policy in general terms is limited to the interest which it was originally intended should be covered by the assured, is to be found in *Scott* v. *Globe Marine Insurance Co.* (2) That was a case in which a carrier took out a floating policy to cover the goods of such of his consignees as should instruct him to insure against the risks of carriage. It so happened that there was a loss of goods in respect of which he was personally liable, and he endeavoured to make a declaration under that policy, which he had not taken out on his own behalf or to cover any interest of his own for that loss, and it was held that inasmuch as that was not the interest which he had originally intended to cover, he could not do that.

Here the interest which the plaintiffs intended to cover was their interest as persons selling goods on commission, in respect of their commission and advances on goods coming forward from their principals in the East. The subject-matter is wide enough to cover all the declarations which it is said ought to have been made, and the interest also is wide enough to cover the declarations which it is said should have been made. It is however suggested that the interest may be limited because the principals from time to time gave instructions to the plaintiffs not to insure particular goods which came forward in the ordinary way with these underwriters but to insure them with the war risk underwriters. In my opinion that is not a limitation of the interest at all. The interest of the plaintiffs was precisely the interest which they had originally intended to insure under this policy, and these instructions to them by

(1) L. R. 8 C. P. 18. (2) 1 Com. Cas. 370.

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their principals in no way affected or limited their interest or altered it in the slightest degree. They were merely instructions that instead of insuring with A. the plaintiffs should insure precisely the same interest with B. As I understand the working of floating policies it is an essential principle that declarations must be made of all goods which come within the terms of the policy to which the interest intended to be covered at the time the floating policy is taken out attaches. See s. 29, sub-s. 3, of the Marine Insurance Act, 1906. The goods about which the question arises in this case were goods which came within the terms of the policy; they were goods to which the interest of the plaintiffs attached, but they were goods in respect of which the plaintiffs had instructions to insure with somebody else. The fact that they had instructions to insure these goods with somebody else seems to me to be wholly immaterial; it in no way affects their interest, and they could no more act on these instructions to the detriment of the defendant than they could select for themselves what goods they would declare and what goods they would not declare under the policy. It seems to me that this is really quite a plain case and upon the true construction of ss. 26 and 29 of the Marine Insurance Act, 1906, the plaintiffs ought to have made those declarations which the defendant says should have been made on this policy. If this is right then upon the facts which are admitted the policy has run off. The result is that there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiffs: *Robert Greening & Co.*
Solicitors for defendant: *Thomas Cooper & Co.*

R. F. S.

[IN THE KING'S BENCH DIVISION AND THE COURT OF APPEAL.]

K. B. D. 1919 *Feb.* 13, 18. C. A. *April* 4, 10.

JENKYNS *v.* SOUTHAMPTON, Etc., STEAM PACKET COMPANY, LIMITED.

Carrier—Passenger's personal Luggage—Bailment to Carrier—Army Officer's Revolver, Binocular Glasses, Ear Defenders, and Flash Lamp—Liability of Carrier for Loss.

The plaintiff, an officer in the Army in uniform, travelled from Southampton to Ryde upon a steamer belonging to the defendant company. He had some luggage with him, one of the articles being a valise labelled with his name and destination and containing (inter alia) a revolver, ear defenders, binocular glasses and a flash lamp. On arriving at Southampton a man in some sort of porter's uniform offered to take his luggage on board, and the plaintiff engaged him to do so. The plaintiff and the porter were passed over the gangway by the company's servants, and went on board the steamer. The porter was not in fact in the company's service. He took the valise to the usual place on the lower deck, in the bows, where the company's servants would themselves have taken it, and deposited it with the other luggage which was in the company's charge. It was seen there after the steamer had started for Ryde and had proceeded a mile or more on its journey down Southampton Water. When the steamer arrived at Ryde, after calling at Cowes, the valise had disappeared, some person having appropriated it. It was admitted that the company were common carriers, and that there were no special conditions. In an action in the county court to recover for the loss the judge gave judgment for the plaintiff:—

Held, that there was evidence that the valise was placed in the company's charge; and that the plaintiff being accepted with his luggage in the steamer for the purpose of the journey, the company undertook to carry it in their capacity of common carriers.

Held, further, that there was evidence that the revolver, the ear defenders, the binocular glasses and the flash lamp were personal luggage, and that the company were therefore liable for their loss.

Appeal by the defendants from a judgment of the judge of the Southampton County Court. The following statement of the facts is, in substance, taken from the judgment of Lush J.

The action was brought to recover from the defendants the sum of 40*l.* 15*s.* 2*d.* as damages for the loss of the plaintiff's valise and its contents being (the plaintiff alleged) passenger's luggage of that value received by the defendants as common carriers to be carried from Southampton to Ryde on the steamer *Solent Queen* on June 18, 1918.

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The plaintiff, an officer in the Army in uniform, travelled from Southampton to Ryde in the steamer which belonged to the defendant company. He had some luggage with him, one of the articles being the valise containing some of his personal belongings, including a revolver, a slide rule, some Army books, ear defenders, a set of compasses, a pair of binocular glasses in a case, and a flash lamp. The glasses had been lent to him. On arriving at Southampton a man in some sort of porter's uniform offered to take his luggage on board, and the plaintiff engaged him to do so. The plaintiff and the "porter" were passed over the gangway by the company's servants, and went on board the steamer. The "porter" was not in fact in the company's service at all, and must be treated, therefore, as merely a servant of the plaintiff. He knew, apparently, how luggage which was brought on board should be dealt with, and he took it to the usual place on the lower deck in the bows, where the company's servants would themselves have taken it, and deposited it with the other luggage which was in the company's charge. It was seen there by the plaintiff after the steamer had started for Ryde and had proceeded a mile or more on its journey down Southampton Water. Attached to the valise was a label bearing the plaintiff's name and destination (St. Helen's Fort, I.W.). When the steamer arrived at Ryde, after calling at Cowes, the valise had disappeared, some person having appropriated it. It was admitted that the defendants were common carriers, and that there were no special conditions, but the defendants contended that they were not liable, on the ground that the valise had never been entrusted to them—that there had in fact been no bailment.

The defendants also contended that certain articles contained in the valise, including the revolver, the slide rule, the Army books, the set of compasses, the ear defenders, the flash lamp, and the pair of binocular glasses were not personal luggage. They further contended that the plaintiff must, in any event, fail as to the binocular glasses, as they did not belong to him, but had been borrowed by him from a friend.

The county court judge overruled the contentions of the

defendants on all these points except that he held, with some hesitation, that the slide rule, the Army books, and the set of compasses were in the nature of tools of trade, and were not personal luggage. Their value was 3*l.* 11*s.*, and the plaintiff's claim was thereby reduced to 37*l.* 4*s.* 2*d.*, for which sum he gave judgment for the plaintiff.

The defendants appealed upon the grounds (1.) that the county court judge was wrong in holding that the valise was ever received by the defendants for conveyance, or was ever in the defendants' custody so as to render them liable to the plaintiff in respect of the loss thereof; (2.) that the county court judge was wrong in holding that the revolver, the ear defenders, the binocular glasses, and the flash lamp were in their nature ordinary personal luggage.

A. Neilson for the defendants. The plaintiff is not entitled to recover any sum from the defendants. He took charge of his luggage and never handed it to the defendants, and they were therefore under no liability: *Great Western Ry. Co.* v. *Bunch.* (1) The defendants, at most, permitted the plaintiff to take his luggage on board. That was, at most, a passive interference. They had nothing to do with the act of the plaintiff in taking his luggage on board. He ought to have handed the valise to a servant of the defendants. They never became bailees of it.

The revolver, ear defenders, binocular glasses, and flash lamp are not articles of personal luggage. They are military articles. As the defendants are only liable as insurers in respect of personal luggage they are not liable for their loss: *Phelps* v. *London and North Western Ry. Co.* (2); *Macrow* v. *Great Western Ry. Co.* (3); *Hudston* v. *Midland Ry. Co.* (4) In order that articles may be personal luggage they must be articles intended for personal use of the individual, and they must be articles which, having regard to the particular class in life in which he is, he would ordinarily require for personal use as distinguished from articles for use in his profession.

(1) (1888) 13 App. Cas. 31.
(2) (1865) 19 C. B. (N. S.) 321.
(3) (1871) L. R. 6 Q. B. 612.
(4) (1869) L. R. 4 Q. B. 366.

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In the present case the articles were in the same position as the tools of a man's trade. The tools of a man's trade, a solicitor's documents, and the arms of a soldier are not personal luggage. [*Talley* v. *Great Western Ry. Co.* (1), *Bergheim* v. *Great Eastern Ry. Co.* (2), and *Bruty* v. *Grand Trunk Ry. Co.* (3) were also referred to.]

Bartley (*S. H. Emanuel* with him) for the plaintiff. The county court judge was right. The receipt of goods by a carrier may take place either actually by delivery to an officer of the carrier: or it may be constructive: *Richards* v. *London, Brighton and South Coast Ry. Co.* (4) There is no obligation on a passenger to employ a porter who is a servant of the carrier. If a railway passenger personally places his luggage in the carriage in which he is travelling, the railway company are still common carriers of the luggage, and the only effect is that if they can show that the loss of the luggage was due to the neglect or default of the passenger, they are exonerated. In the present case the valise was seen during the course of the journey to be on board the boat in the usual place where luggage is carried. The defendants were therefore still carrying it as common carriers. There was no evidence of neglect or default on the part of the plaintiff. The valise had a label on it, and as it was in the usual place where luggage is carried, the defendants are liable upon the same principle as an innkeeper is liable for a guest's coat placed where coats are ordinarily kept: *Orchard* v. *Bush & Co.* (5) The valise was in the defendants' custody on their boat. If the plaintiff had taken it with him into the saloon the defendants would have been liable as common carriers unless they could show negligence on his part: *Great Western Ry. Co.* v. *Bunch.* (6)

As to whether the articles were the plaintiff's personal luggage, it is impossible to give a definition of personal luggage. It is a question of degree having regard to the position in life of the passenger: *Macrow* v. *Great Western Ry. Co.* (7) In

(1) (1870) L. R. 6 C. P. 44.
(2) (1878) 3 C. P. D. 221.
(3) (1871) 32 Upp. Can. Rep. 66.
(4) (1849) 7 C. B. 839.
(5) [1898] 2 Q. B. 284.
(6) 13 App. Cas. 31.
(7) L. R. 6 Q. B. 612.

the present case the county court judge has found as a fact that the articles were the plaintiff's personal luggage, and there was evidence upon which he could so find. [Story on Bailments, 9th ed., s. 499, p. 472, was also referred to.]

Neilson in reply. The plaintiff must, in order to recover, give some evidence of bailment. The onus is not on the defendants of proving that the goods were not placed in their custody. *Orchard* v. *Bush & Co.* (1) is distinguishable. Immediately goods are placed in an inn the innkeeper becomes liable, but merely placing luggage upon the platform in a railway station does not make a railway company responsible for its loss. There must be a handing over of the luggage to the defendants or their representative in order to make them liable for its loss.

Cur. adv. vult.

Feb. 18. The following judgments were read:—

LUSH J. (after stating the facts) continued: It was admitted that the company were common carriers and that there were no special conditions, but the company contended that they were not liable on the ground that the valise had never been entrusted to them, that there had in fact been no bailment. The learned judge gave judgment for the plaintiff. In my opinion he took the right view, and his judgment should be affirmed. The plaintiff being accepted with his luggage on the steamer for the purpose of the journey the company undertook to carry it in their capacity of common carriers, and they came under the same obligation that they would have been under if one of their own servants had taken it on board, subject only to this: that if the passenger, the plaintiff, chose to keep it under his own charge while on the steamer, instead of placing it under the company's charge, then if any act or default of his had caused or contributed to the loss the company would have been absolved. Assuming, as we were asked to assume, that the plaintiff kept it under his own charge, his position is precisely the same as that of a railway passenger who, with the acquiescence or assent

(1) [1898] 2 Q. B. 284.

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of the company, takes luggage with him into his compartment. The company would still be liable, unless, as I have said, they could show that some act or default of the passenger caused or contributed to the loss. It would be impossible for them to contend that there was no bailment merely because the package was not first handed to the porter. It is equally impossible here. The defendants never did show that some act or default of the plaintiff caused or contributed to the loss. The learned judge was not asked to come, and never did come, to any such conclusion, and the valise being in its proper place on the steamer no such conclusion would have been possible. But I think further that there was ample evidence here to support what I gather was the learned judge's finding, that the valise was placed in the company's charge. They allowed it to be taken on board knowing, as they must be taken to have known, that it would probably be placed with the other luggage. Their servants must have seen it and allowed it to remain with luggage in their charge without objection.

The case which was put in argument of an innkeeper and his guest is, I think, analogous. If a guest were to enter an inn with an article of luggage in his hand, and was accepted as a guest, and if, seeing no hotel servant to take his package, he deposited it in the usual place in the inn, I cannot doubt that the innkeeper would be held to have it in his charge, and would be liable accordingly. He certainly would be if a guest were to hang up his coat on a peg provided for the purpose. See *Orchard* v. *Bush & Co.* (1)

A subsidiary point was raised in this appeal. It was contended that two or three of the things in the valise were not personal luggage. I will refer to two as the same principle that applies to them applies to all. There was a revolver in the valise, and there were a pair of binocular glasses. It was said that a revolver cannot be personal luggage, and that the glasses were not, because they had been lent to the plaintiff, and were not his own property. The learned judge held that both these articles were personal luggage, and I agree with him as to this also. Any article intended for his personal

(1) [1898] 2 Q. B. 284.

use, and not in the passenger's possession with a view to selling it and dealing with it as an article of commerce, is personal luggage if it falls within that class of things which a person in his position and of his calling or occupation would reasonably or ordinarily require for his personal use. A revolver for an officer is as much an article of that kind as the easel of an artist, or many other of the numerous things that have been treated as ordinary luggage.

With regard to the glasses there is no ground whatever for saying that a borrowed article cannot be personal luggage. It is the property of the borrower for the time being, and if it is lost the passenger can recover its value just as if it was his own. The appeal must be dismissed with costs.

SANKEY J. I agree. There are two points: (1.) Were the defendants under any liability? (2.) Were the suit case and its contents the personal luggage of the plaintiff?

As to the first point: The law as to the liability of carrying companies with regard to passengers' personal luggage is well settled. If they assume complete control of it they incur the full liability of common carriers. That liability may, however, be modified to the extent that if a passenger takes his personal luggage out of the complete control of the company, as for example by having it with him in the compartment, then if loss happens by reason of want of care by the passenger himself, the company are not liable: *Great Western Ry. Co.* v. *Bunch.* (1)

The company in this case contend: (*a*) That there was no evidence of any contract by them to carry the suit case in question, or, at any rate, no evidence to support a contract imposing full liability. (*b*) That in any event their liability was only of the modified extent.

As to (*a*) it was argued that in order to create a contract, luggage must be delivered to some servant of the company. It is true that in an ordinary case delivery to an agent of the company is the usual way of making a contract, but in my view it is not the only way, and I think it was open to the

(1) 13 App. Cas. 31.

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judge to infer from the facts of this case that there was a contract between the plaintiff and the defendants. The plaintiff was received on board with his suit case. He saw it not only placed upon the boat, but also deposited by the "porter" engaged by him in the usual place for luggage in the bows. It was in that usual place when the vessel started on its voyage, and had attached to it a label bearing the plaintiff's name and destination. In my opinion the learned judge was entitled to infer from this an invitation to the plaintiff to come on board with his suit case, the defendants' acquiescence in his depositing it in the proper and usual place, and consequently a contract by them to carry.

As to (*b*) the judge has found as a fact that there was no negligence by the plaintiff. Under these circumstances, whether the company incurred the full or the modified liability, there was evidence upon which the judge could find as he did.

As to the second point: In my view it is neither possible nor desirable to give an exhaustive definition of what is personal luggage. A proper direction upon the subject is found in Cockburn C.J.'s judgment in *Macrow* v. *Great Western Ry. Co.* (1), the head-note of which reads: "Whatever the passenger takes with him for his personal use or convenience, according to the habits or wants of the particular class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of the journey, is to be considered as personal luggage." The judge had this direction before him and correctly applied the law to the facts. Some of the articles in question he disallowed on the ground that they were not personal luggage. As to others he decided they were. There was evidence upon which he could come to the conclusion he did, and he made no mistake in law in so doing. In the result the appeal must be dismissed.

Appeal dismissed.

(1) L. R. 6 Q. B. 612.

J. E. A.

The defendants appealed.

April 4, 10. *R. A. Wright K.C.* and *Neilson K.C.* for the defendants.

Emanuel K.C. for the plaintiff was not called upon.

The argument for the defendants proceeded on the same lines as in the court below. The following authorities were referred to :—*Phelps* v. *London & North Western Ry. Co.* (1) ; *Macrow* v. *Great Western Ry. Co.* (2) ; *Britten* v. *Great Northern Ry. Co.* (3) ; Angell on Carriers, s. 115 ; and *Great Western Ry. Co.* v. *Bunch.* (4)

BANKES L.J. The defendants own steamships which ply between Southampton and the Isle of Wight. The plaintiff, a lieutenant in the Royal Garrison Artillery, was on the occasion on which he lost his luggage travelling on duty by the defendants' steamship from Southampton to Ryde. He had with him a valise, which contained, in addition to articles of clothing, certain articles which the defendants contend are not his personal luggage, or the ordinary luggage of a passenger for which they are responsible as common carriers. These articles are a revolver, ear defenders, binocular glasses, and a flash lamp ; all of them things which, while this country was at war, officers usually carried about with them as part of their ordinary luggage. I agree with Sankey J. that it is undesirable to attempt to give any exhaustive definition of what constitutes a passenger's ordinary luggage. The rules which should guide anyone who has to decide that question as a matter of fact are laid down by Cockburn C.J. in delivering the judgment of the Court of Queen's Bench in *Macrow* v. *Great Western Ry. Co.* (5), and have, so far as I know, been universally accepted as a true guide to a decision as to what does, or does not, constitute a passenger's ordinary luggage. The passage is referred to in the judgment of Sankey J. and it is not necessary to repeat it. It seems to me that the county court judge correctly interpreted that judgment and

(1) 19 C. B. (N. S.) 321.
(2) L. R. 6 Q. B. 612.
(3) [1899] 1 Q. B. 243.
(4) 13 App. Cas. 31.
(5) L. R. 6 Q. B. 622.

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properly directed himself as matter of law. One passage in his judgment has been criticized. The passage is this:—"In this connection regard must be had to the particular class of persons to which the passenger belongs." I do not think that that passage indicates that the county court judge misdirected himself, because, after having set out the list of articles, he proceeds to refer to *Macrow's Case* (1) as stating the principle upon which he is to act. If he meant that the class of persons to which the passenger belongs was the only test, it would be wrong. But I look upon that passage as containing a mere verbal inaccuracy, and as not intended to be exhaustive; and I do not think that it indicates a misdirection with regard to the question which the judge had to decide. It is necessary to consider the particular class to which the passenger belongs as one element, but, as Cockburn C.J. pointed out, it is necessary to consider other matters as well. I think therefore that the county court judge correctly directed himself, and that there was evidence upon which he was justified in coming to the conclusion that these particular articles were, in the circumstances of the case, the ordinary luggage of a passenger of the class to which the plaintiff belonged.

I also agree that there was evidence upon which the county court judge could properly arrive at the conclusion that the valise was entrusted to the defendants as passenger's luggage. In my opinion the judgment of Sankey J. is correct, and I entirely agree with it. The appeal fails.

DUKE L.J. I am of the same opinion. I will only add that I do not express any opinion whether the rights of a passenger by the defendants' steamship are in this respect limited by the terms of the Acts applicable to railway companies. The defendants as common carriers are under the like liability with that of a railway company at common law.

ATKIN L.J. I agree, I think it is safe to assume for the purposes of this case that the liability of the defendants is at any rate as extensive as the liability of railway companies who

(1) L. R. 6 Q. B. 612.

carry passenger's luggage under private Acts in identical terms enabling a passenger travelling upon the railway to take with him his ordinary luggage. What the precise liability of a steamship company in these circumstances is—whether they are in the strict sense common carriers of passenger's luggage, or whether their liability, though not that of common carriers, is identical with that of common carriers, which is the definition of the liability usually stated in shipping cases—it does not seem to me to be necessary to determine. Supposing the obligation is to carry the ordinary luggage of a passenger, I am very much inclined to agree with the observation of Lush J. in *Hudston* v. *Midland Ry. Co.* (1) where he said: "The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage." But I am content to assume for the purposes of this case that the further definition contained in the judgment of the Court of Queen's Bench in *Macrow* v. *Great Western Ry. Co.* (2) is that which ought to be applied, and if it is applied I am satisfied that there was ample evidence upon which the county court judge could come to the conclusion that the articles in question came within that definition. I may add that I must not be taken as assenting to the view that the county court judge was right in excluding the three articles which he excluded as not being passenger's ordinary luggage. As to that I desire to express no opinion.

With regard to the other point, I think there was abundant evidence upon which the county court judge could find that the defendants were bailees of the valise.

Appeal dismissed.

Solicitors for plaintiff: *Lowe & Co., for A. H. Emanuel, Southampton.*

Solicitors for defendants: *Speechly, Mumford & Craig, for Lamport, Bassitt & Hiscock, Southampton.*

(1) L. R. 4 Q. B. 366, 370. (2) L. R. 6 Q. B. 622.

W. F. B.

1919

April 11.

COWAN *v.* SEYMOUR (SURVEYOR OF TAXES).

Revenue—Income Tax—Office or Employment of Profit—Winding up of Company—Present by Shareholders to unpaid Secretary and Liquidator—Perquisite or Profit accruing by Reason of Office—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *s.* 146, *Sched. E—Income Tax Act*, 1853 (16 & 17 *Vict. c.* 34), *s.* 2, *Sched. E.*

The appellant acted as secretary of a company without remuneration from the date of its incorporation in January, 1912, and when the company was wound up voluntarily in September, 1916, he was appointed liquidator for the purpose of the winding up, and he acted in that capacity without remuneration. A final general meeting of the company was held for the purpose of having an account of the winding up laid before the members of the company. It appeared that there was a sum in hand amounting to 1172*l.*, which was divisible amongst the ordinary shareholders of the company. A resolution was passed at that meeting, which was assented to by all the shareholders of the company, that the chairman and the appellant be asked each to accept a moiety of the balance, and that the best thanks of the shareholders were due and were tendered to them for the services they had rendered to the company throughout its existence and during the winding up. The appellant received a moiety of the balance amounting to the sum of 586*l.* :—

Held, that as the resolution of the shareholders giving the money to the appellant was passed at the final general meeting of the company and the payment was made in recognition of the services rendered by the appellant to the company as secretary and liquidator, the money accrued to the appellant by reason of his office, which thereupon became an office or employment of profit within the meaning of the first rule contained in s. 146 of the Income Tax Act, 1842, for charging duties under Sched. E, and the appellant was therefore liable to pay income tax under Sched. E upon that sum.

Case stated by the Commissioners on public offices or employments of profit in the City of London.

At a meeting of the Commissioners held on December 17, 1917, the appellant, Charles John Cowan, appealed against an assessment to income tax raised upon him in the sum of 586*l.* 8*s.* 4*d.* under the provisions of s. 2 (Sched. E) and s. 5 of the Act 16 & 17 Vict. c. 34 in respect of the year ending April 5, 1917, received by him as secretary and liquidator of the New Zealand and Federal Co., Ltd.

The New Zealand and Federal Co., Ltd. (hereinafter called " the company "), was duly incorporated under the Companies (Consolidation) Act, 1908, on January 2, 1912, with a registered

office situate at No. 138 Leadenhall Street in the City of London.

The appellant acted as secretary of the company without remuneration from the date of its incorporation until his appointment as liquidator of the company by the resolution next hereinafter mentioned.

At an extraordinary general meeting of the company, held on September 19, 1916, the following resolution was passed: "That the company be wound up voluntarily and that Charles John Cowan of No. 138 Leadenhall Street, London, E.C., shall be and he is hereby appointed liquidator for the purpose of such winding up."

The appellant gave evidence that until the passing of the resolution of November 29, 1916, next hereinafter mentioned, he gave his services as secretary and liquidator gratuitously, and that until the passing of that resolution he did not receive or agree to receive anything from or in respect of the company.

An extraordinary general meeting of the company was duly held on November 29, 1916, for the purpose of having an account of the winding up laid before the members of the company pursuant to s. 195 of the Companies (Consolidation) Act, 1908, showing the manner in which the winding up had been conducted and the property of the company disposed of, and of determining by extraordinary resolution the manner in which the books, accounts and documents of the company, and of the liquidator, should be disposed of.

The minutes of the meeting, after reciting that Mr. Warrington Laing had acted as chairman and the appellant as secretary and liquidator of the company since its inception without remuneration for their services, and that as appeared by the accounts, after meeting all claims there was a sum in hand equal to 6.86*d.* per share, which according to the company's memorandum of association was divisible amongst the ordinary shareholders of the company, record that the following resolution was passed: "That subject to the assent of each ordinary shareholder in respect of the share payable to him, Mr. Warrington Laing, the chairman, and Mr. C. J. Cowan, the late secretary, be asked each to accept a moiety of such balance, and

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further that the best thanks of the shareholders are due and are hereby tendered to Mr. Laing and Mr. Cowan for the services they have rendered to the company throughout its existence and during the winding up of the same."

The resolution was signed or initialled by all the shareholders of the company.

The appellant received the moiety of such balance amounting to the sum of 586*l.* 8*s.* 4*d.* above mentioned, which was paid to him during the year ending April 5, 1917, namely, on December 6, 1916.

The return of the final winding-up meeting of the company was registered on November 30, 1916.

The appellant contended (*a*) that he did not hold any office or employment of profit under the company within the meaning of r. 3 of s. 146 of 5 & 6 Vict. c. 35 (1); (*b*) that the sum given to him by the shareholders was a purely voluntary gift, and by reason of clause 6 of the Memorandum of Association and clause 95 of the Articles of Association and s. 186 of the Companies (Consolidation) Act, 1908, could not be other than a voluntary gift; (*c*) that the whole of the duties of the appellant as secretary and liquidator of the company had terminated before the gift was made or offered; and (*d*) that the payment was at most a payment of capital by way of a retiring bonus after the services had terminated and not a salary for the purposes of taxation.

(1) Income Tax Act, 1842 (5 & 6 Vict. c. 35), s. 146: "The duties hereby granted, contained in the Schedule marked (E) shall be assessed and charged under the following rules, which rules shall be deemed and construed a part of this Act, and to refer to the said last-mentioned duties, as if the same had been inserted under a special enactment.

"SCHEDULE (E).

"*Rules for charging the said Duties.*

"First.—The said duties shall be annually charged on the persons respectively having, using, or exercising the offices or employments of profit mentioned in the said Schedule (E), or to whom the annuities, pensions, or stipends mentioned in the same Schedule shall be payable, for all salaries, fees, wages, perquisites, or profits whatsoever accruing by reason of such offices, employments, or pensions. . . . .

"Third.—The said duties shall be paid on all public offices and employments of profit of the description hereinafter mentioned within Great Britain; (vide licet) . . . . any office or employment of profit held under any ecclesiastical body, whether aggregate or sole, or under any public corporation, or under any company or society whether corporate or not corporate. . . . ."

It was contended on behalf of the surveyor of taxes (inter alia) (*a*) that the terms of the resolution of November 29, 1916, clearly showed that the payment was made for services rendered to the company as secretary and as liquidator; (*b*) that directly a payment was made the office held by the appellant became an office or employment of profit within the meaning of the above-named sections, and that as if the services had not been rendered the payment would not have been made, such payment accrued to the appellant in virtue of his office or employment and was properly assessable under the provisions of the Income Tax Acts.

The Commissioners were of opinion that the appellant was the holder of an office or employment of profit within the meaning of r. 3 of s. 146 of the Act 5 & 6 Vict. c. 35, and they accordingly confirmed the assessment.

Edwardes Jones for the appellant. The appellant acted as secretary and afterwards as liquidator of the company without remuneration and therefore he never held any office or employment of profit under the company within the meaning of r. 3 of s. 146 of the Income Tax Act, 1842. The sum voted to him by the shareholders by the resolution of November 29, 1916, was really a voluntary gift by the ordinary shareholders out of moneys which they had received in the liquidation. A company which is in liquidation cannot validly pass a resolution to compensate the officials of the company for their loss of employment or to remunerate the directors for their past services—*Hutton* v. *West Cork Ry. Co.* (1) In *Smyth* v. *Stretton* (2) the question was whether the true effect of the scheme was to increase the salaries of the assistant masters of Dulwich College, the payment of such increase being deferred, or whether it was merely an arrangement by which they were given retiring bonuses on ceasing to hold the position of assistant masters. Looking at the substance of the present case it cannot be put higher than a bonus paid to the appellant when he ceased to hold office. An office to which no pay is attached is not turned into an office or employment of profit

(1) (1883) 23 Ch. D. 654. (2) (1904) 5 Tax Cas. 36.

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by making a present to the person who held the office after he ceased to hold office. The cases dealing with the assessment of gifts to clergymen are not very relevant. In *Turner* v. *Cuxon* (1) a grant to a curate out of the Curates' Augmentation Fund was held to be not assessable as it was a personal gift made to the curate in recognition of his faithful services for more than fifteen years and was not given to him as curate of a parish. In *Herbert* v. *McQuade* (2) a grant received by the incumbent of a parish out of a Clergy Sustentation Fund was held assessable to income tax as being profits accruing by reason of his office. There the grant was made as an augmentation of the benefice and it became attached to the benefice so that a succeeding incumbent took it as part and parcel of the benefice. It cannot however be suggested that if the appellant had ceased to act as liquidator that the gift would have been made to his successor. Further, the appellant did not hold an office or employment of profit until he received payment of this sum, and therefore it could not have accrued to him by reason of an office or employment of profit.

Sir Ernest Pollock S.-G. and *T. H. Parr* for the respondent. Under s. 195 of the Companies (Consolidation) Act, 1908, a company is not deemed to be dissolved until the expiration of three months from the registration of the return of the final winding-up meeting of the company. That return was registered on November 30, 1916, and therefore at the time the resolution was passed on November 29 the company was still in existence. The money was given to the appellant in his office as liquidator in respect of his services rendered as liquidator. As soon as that was done the office became an office of profit and the appellant became assessable under r. 3 of s. 146 of the Income Tax Act, 1842. It is true that the money was distributable among the shareholders, but that was merely the source from which the present came. The source of the gift however is immaterial. In *Turner* v. *Cuxon* (1) the gift was made to the curate in respect of his personal qualification and not by reason of his holding any office and therefore it was held not assessable. In *Herbert* v. *McQuade* (2) on the other

(1) (1888) 22 Q. B. D. 150. (2) [1902] 2 K. B. 631.

hand the grant from the sustentation fund accrued to the incumbent by reason of his being the incumbent of the benefice and therefore was assessable. Stirling L.J. there pointed out (1) that "a profit accrues by reason of an office when it comes to the holder of an office as such—in that capacity—and without the fulfilment of any further or other condition on his part." In *Blakiston* v. *Cooper* (2) voluntary Easter offerings of money given as a freewill gift to the incumbent of a benefice as such for the purpose of increasing his stipend were held assessable to income tax as profits accruing to him by reason of his office. Lord Loreburn there pointed out that it mattered little what you chose to call it. The point was what was it in reality? The facts in the present case bring it within the rule laid down in those cases.

Edwardes Jones replied.

ROWLATT J. This case is not free from difficulty. The facts are these, a company was being wound up and the appellant, who had been secretary of the company without remuneration, acted as liquidator in the winding up also without remuneration, but when the final meeting of the company was held the ordinary shareholders who were entitled to have distributed among them an amount of something over 1000*l.* agreed individually that that sum should be given in equal moieties to the chairman of the company and to the liquidator. The question is whether that sum was a profit accruing to the appellant by reason of his office of liquidator within the first rule of Sched. E.

This class of problem has been much discussed in the well-known series of cases with regard to the supplementary receipts of clergymen. Grants from funds for the augmentation of the income of benefices were discussed in *Herbert* v. *McQuade.* (3) One case, that of *Turner* v. *Cuxon* (4), arose upon a grant by a society to a deserving curate in recognition of faithful service. Easter offerings were dealt with by the House of Lords in *Blakiston* v. *Cooper.* (2) One or two principles have emerged quite clearly from those cases, one being that

(1) [1902] 2 K. B. 650.
(2) [1909] A. C. 104.
(3) [1902] 2 K. B. 631.
(4) 22 Q. B. D. 150.

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which was laid down in *Herbert* v. *McQuade* (1) by Collins M.R., namely, that the fact that the payment is voluntary on the part of those who make it does not prevent it accruing to the recipient by reason of his office. The test is, as the Master of the Rolls there points out, "whether, from the standpoint of the person who receives it, it accrues to him in virtue of his office,"—that is to say, whether he has got it by his deserts in his office—"if it does, it does not matter whether it was voluntary or whether it was compulsory on the part of the persons who paid it."

In *Blakiston* v. *Cooper* (2) Easter offerings were held to be given in return for services rendered by the clergyman although collected voluntarily. Lord Loreburn L.C. said (3) that "where a sum of money is given to an incumbent substantially in respect of his services as incumbent, it accrues to him by reason of his office. Here the sum of money was given in respect of those services. Had it been a gift of an exceptional kind, such as a testimonial, or a contribution for a specific purpose, as to provide for a holiday, or a subscription peculiarly due to the personal qualities of the particular clergyman, it might not have been a voluntary payment for services, but a mere present." It may be therefore that all we are really concerned with in this case is a somewhat nice question of fact, and if that is so the Solicitor-General is entitled to say that he has a finding of fact in his favour. I do not however propose to deal with the case in that way; I shall deal with it as raising a question for this Court.

It very often happens that the holder of an office, whether it be an honorary office or an office of profit, receives a present on relinquishing the office, and there is no more convenient illustration of such a case than the case of a clergyman who receives a present when he leaves or is about to leave his benefice or curacy. In the present case this present or contribution was made to the appellant when his office of liquidator was practically at an end although technically the company and the liquidatorship still existed. If a testimonial is given to the holder of an office, say to a clergyman, when he ceases

(1) [1902] 2 K. B. 649. (2) [1909] A. C. 104.
(3) Ibid. 107.

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to hold the office because he has been a very good clergyman or other officer and people admire him, it may be that that present would be regarded as personal to him though the occasion of making it arose out of his past services. This case however I think falls on the other side of the line. It is quite true that this contribution was made to the appellant voluntarily by the individual shareholders of the company, who constructively had this money in their own pockets, but they passed the resolution giving the money to the appellant at the final general meeting of the company. The appellant in filling the office of liquidator had been acting as their officer and had been performing duties which involved obligations to them and also involved public obligation before the law, and he had done all the work without stipulating for any payment. I think the proper way to look at the case is the way which the Commissioners have looked at it (it is really a question of fact), namely, that the ordinary shareholders of the company, to whom the money belonged, decided when the winding up of the company was completed that the appellant ought to be remunerated for his services as secretary and liquidator, and that payment was made by each of the shareholders giving up the share of the money to which he was entitled and giving it to the appellant instead. The appellant received the money and it therefore accrued to him by virtue of his office.

There is only one other point to deal with. It has been contended by Mr. Edwardes Jones with very great ingenuity that until the appellant received that payment he did not have an office of profit, and therefore the payment could not accrue to him by virtue of an office of profit. But I think the commonsense answer to that contention is that made by the Commissioners, namely, that when the appellant received the payment the office became an office of profit if the payment accrued to him by virtue of the office.

In all the circumstances I think that this appeal fails although it is very near the line. *Appeal dismissed.*

Solicitors for appellant: *Thomas Eggar & Co.*

Solicitor for respondents: *Solicitor of Ireland Revenue.*

R. F. S.

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April 9, 15.

HON. J. D. FITZGERALD AND OTHERS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Income Tax—Super Tax—Method of Computation—Sources of Income—Continuance in Existence during Year of Assessment—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 164—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66—*Finance Act*, 1916 (6 *&* 7 *Geo.* 5, *c.* 24), *s.* 24.

Notwithstanding that super tax is called in s. 66 of the Finance (1909-10) Act, 1910, "an additional duty of income tax," it is really a retrospective tax on the total income of the person charged for the year previous to the year of assessment, and provided that the person charged is alive it is immaterial whether or not the sources of income continue in existence during the year of assessment.

SPECIAL CASE stated under the Finance (1909–10) Act, 1910, s. 72, sub-s. 6, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax.

At a meeting of the Commissioners held at York House, Kingsway, London, on April 12, 1917, for the purpose of hearing appeals, the Hon. J. D. Fitzgerald, K.C. (hereinafter called the appellant), appealed against an assessment to super tax in the sum of 13,916*l.* (gross) less the statutory abatement of 2500*l.* for the year ended April 5, 1917, made upon him by the Special Commissioners of Income Tax under the provisions of the Finance (1909–10) Act, 1910, and the Finance Act, 1916.

The following facts were proved or admitted :—

The appellant, one of His Majesty's counsel, whose practice was then mainly at the Parliamentary Bar, was in January, 1916, invited by the Board of Trade to join a committee appointed to advise on the winding up of enemy firms. He accepted the invitation, and at once found that the work of the committee was of such magnitude and would occupy so much of his time as to make it necessary for him to give up either his practice at the Bar or his seat on the committee. He decided to give up the former, and in March, 1916, he retired from practice as a barrister. The members of the

committee received no payment for their services, which were entirely gratuitous.

The appellant was assessed to income tax under Sched. D in respect of his profits as a practising barrister for the year ending April 5, 1916, in the sum of 5905*l.*, and this sum was included in the said assessment to super tax of 13,916*l.* for the year ending April 5, 1917. No assessment under Sched. D was made upon the appellant as a barrister for the year ending April 5, 1917, during the whole of which year he had ceased to practise.

On behalf of the appellant it was contended: (*a*) That as he had entirely ceased to practise his profession before the year of assessment ended April 5, 1917, no sum in respect of professional earnings could legally be included in any assessment upon him to super tax in respect of such year.

(*b*) That super tax was only "an additional duty of income tax" and could lawfully be charged or assessed in respect only of sources of income existing during some part of the year of assessment.

(*c*) That super tax like income tax was imposed and was chargeable only in respect of the sources of income specified in the Income Tax Acts and existing in some part of the year of assessment.

(*d*) That the assessment under appeal was contrary to the settled and fundamental principles of income tax law.

(*e*) That the income from all sources for the previous year was only the measure or basis upon which an assessment to super tax was to be "estimated" for the purposes of the year of assessment, and that the income charged was that of the year of assessment.

(*f*) That no assessment to income tax had been made or could lawfully be made upon the appellant in respect of professional earnings during the year ended April 5, 1917.

(*g*) That s. 18 of the Finance Act, 1915, had no application to the present case and was enacted in order to remedy the decision in *Inland Revenue Commissioners* v. *Brooks* (1), and that the question to be decided was one of liability and not of amount.

(1) [1915] A. C. 478.

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On behalf of the respondents it was contended—

(*a*) That the Finance (1909–10) Act, 1910, provided rules for ascertaining the quantum of an assessment to super tax.

(*b*) That the total income liable to super tax assessment was, under the authority of that Act, "the total income . . . . from all sources for the previous year," and therefore from all sources existing in the previous year.

(*c*) That the assessment to super tax upon the appellant for the year ending April 5, 1917, rightly included an amount in respect of his professional earnings for the previous year, and that by virtue of s. 18 of the Finance Act, 1915 (5 & 6 Geo. 5, c. 62), such amount was correctly included in the assessment at the figure 5905*l.*, being the amount of the assessment to income tax under Sched. D for the previous year.

In the opinion of the Commissioners the contentions put before them on behalf of the respondents succeeded, and they thereupon confirmed the assessment.

Subsequently to the hearing of the appeal the income tax assessment of 5905*l.* was reduced to 4699*l.*, and it had therefore been agreed that in the event of the Court deciding this case in favour of the respondents the super tax assessment was to be reduced from 13,916*l.*, as set out in the first paragraph of the case, to 12,710*l.*

In the event, however, of the Court deciding this case in favour of the appellant the said super tax assessment fell to be reduced from 13,916*l.* to 8011*l.*

The Hon. J. D. Fitzgerald, K.C., died on May 11, 1918, and his executors were added as appellants in the appeal.

Hogg K.C. and *Bremner* for the appellants. Super tax was imposed by s. 66, sub-s. 1, of the Finance (1909–10) Act, 1910. It is there termed "an additional duty of income tax," and is levied "in respect of the income of any individual, the total of which from all sources exceeds" a certain amount. Sub-s. 2 provides that "for the purposes of the super tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources

for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." Under s. 164 of the Income Tax Act, 1842, a person claiming to be entitled to exemption has to deliver a statement setting forth all the particular sources from whence his income arises, and the particular amount arising from each source. In the same way in dealing with super tax the income from each particular source has to be added together to find the income from all sources. If a source of income ceases to exist before the commencement of the year of assessment there can be no income tax in respect of that source, and therefore no super tax. Super tax is not a tax on the income of the person charged for the previous year, but an additional duty of income tax in respect of the income of the year of assessment. It is not independent of source of income because of the basis of assessment provided in s. 66, sub-s. 2. If the contention of the Crown is correct an individual would have to pay super tax in respect of a year in which he earned nothing, although he had ceased to be liable to pay income tax. It is true that if a man retires from business during a year he would have to pay super tax for that year because he would have to pay income tax, and super tax is an additional duty of income tax. If a man becomes liable to pay super tax the amount is fixed in accordance with the basis of assessment provided in s. 66, sub-s. 2. Before however a person can be liable to super tax he must be liable to pay income tax for that year. As therefore Mr. Fitzgerald had ceased to practise before the commencement of the year of assessment he was not liable to pay super tax in respect of that year.

Sir Ernest Pollock S.-G. and *T. H. Parr* for the respondents. Income tax is not a tax upon the income which a man actually receives, it is a tax upon a statutory income estimated by rules contained in the Income Tax Acts. The contention that super tax, like income tax, is dependent upon the existence of sources of income, and that when the sources of income cease to exist liability to pay super tax as well as income

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tax also ceases, is not correct, because s. 66, sub-s. 2, of the Act of 1910 provides that "for the purposes of the super tax, the total income of any individual from all sources shall be taken to be"—not shall be—"the total income of that individual from all sources for the previous year." Mr. Fitzgerald enjoyed an income from his practice at the Bar during the year previous to the year of assessment, and therefore he is liable to super tax during the year of assessment. Provision is made in s. 6 of the Finance Act, 1912 (2 & 3 Geo. 5, c. 8), for the case of a person liable to super tax dying during any year for which super tax is charged, a portion only of the tax being charged proportionate to the part of the year which had elapsed before the death. No provision however has been made for the case of a person retiring from business during the course of the year of assessment.

Hogg K.C. replied.

April 15. ROWLATT J. read the following judgment. The facts in this case are extremely simple. The late Mr. Fitzgerald, K.C., retired from practice at the Bar in March, 1916. For the year 1916–1917 he was therefore not assessable to income tax in respect of his former profession, for he did not carry it on during that year. He was assessed to super tax, however, on his previous year's total income, including his professional earnings. Whether the inclusion of those earnings is or is not in accordance with the law is the question in this appeal.

Mr. Hogg contended that inasmuch as super tax is described in the section imposing it as "an additional duty of income tax" it must follow the scheme of the income tax, which depends upon the existence in the year of assessment of each source in respect of which it is imposed. The contention of the Crown, on the other hand, was that it was a tax on the individual personally in respect of his previous year's income without regard to the question what sources of income he had or whether he had any income or source of income in the year of assessment. I apprehend Mr. Hogg's argument to apply to particular sources of

income and not kinds of sources according to the classification contained in the various schedules or cases under the schedules. For instance, if a man changed from one profession to another or from one office to another Mr. Hogg would say that the profession or office abandoned had ceased, though the person was still taxable on the profits of a profession or an office. The argument must be on this basis if it rests on following the scheme of the income tax.

It cannot be doubted that, at any rate speaking generally, the income tax which is imposed for the year for and in respect of the several sources of income named in the several schedules, depends upon the existence in the hands of the person assessed during the year or lesser period of assessment of the source of income taxed. Where the tax is levied by deduction it automatically follows the income in its transfer from hand to hand. Where it is levied upon the recipient the assessment is in respect of the possession of the source of income though the income is estimated in many cases by the average of a former period. If some kinds of income were taxed in the year of the possession of the source and other kinds in the year succeeding its possession, the grave inconvenience would follow that in the year following a change in the employment of capital from one category to another there would be either no taxation or a double taxation, according to the direction in which the change was made. There are well-known provisions for the adjustment of taxation in the event of the discontinuance by death or abandonment of any source of assessable income during the year of assessment. I have said that, speaking generally, this is the scheme, because there may be some more or less obscure exceptions the existence or extent of which may form the subject of future litigation.

Now, when one turns to the consideration of s. 66 of the Finance (1909–10) Act, 1910, imposing the super tax, the first thing that strikes one about it is that it pays no regard to a broken year. A difficulty at once arose in the case of death. The position appeared to be that if the taxpayer had lived for ever so short a time in the year of assessment,

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he became liable to super tax on the whole of his last year's income just as if he had lived out the year of assessment, subject possibly to some difficulty as to the machinery for collection if he died before an assessment was made. This point has now been provided for by s. 6 of the Finance Act, 1912. There is no provision, however, for any apportionment upon bankruptcy, still less for any other disappearance during the year of assessment of all or any of the sources of income. Mr. Hogg admitted that if a source of income existed for any part of the year of assessment the assessment would not be affected by its disappearance before the end of it. This is in accordance with the view that super tax is an impost which falls upon the subject in toto immediately the year of assessment begins, and that though expressed to be chargeable for the year it has not the characteristic (as imposed and subject to the provision now imported in the case of death) of accruing over the year. It seems to me that this admission (which I do not think could be avoided) makes a serious breach in Mr. Hogg's argument; because it is quite clear that the income tax, to which it is the basis of his argument to assimilate the super tax (at any rate the tax on professions), is only proportionate to the part of the year during which it is carried on (see s. 134 of the Act of 1842). Now the basis of super tax is the previous year's income, and the question is whether the scheme of it involves the existence of the sources of that income during the year of assessment. If, as Mr. Hogg admits, such sources need not exist for the whole of the year I cannot see any reason for presuming that they must have been contemplated as existing for any part of it.

In my opinion the words of the section are really quite clear. They simply impose upon the subject a tax with reference to his income the year before. It is really a retrospective tax on the total income of the previous year, and his position in the year of assessment, provided he is alive, is wholly immaterial. It is true it is called additional income tax, but I think that merely means that it is a further new impost in respect of income and does not involve that it is additional in the case of every item in the income tax of each taxpayer

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for the year of assessment. It is true, furthermore, that a person without any income and without any source of income, even an adjudicated bankrupt, may thus be liable to super tax. This is the inconvenience of retrospective taxation. But if inconveniences are to be considered I may point out that if the argument of the appellant in this case is correct an annual change of investment would afford the means of avoiding super tax altogether, so far as investments were concerned.

For these reasons I think the appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Western & Sons.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

R. F. S.

C. A.
1919
March 13, 14, 17.

[IN THE COURT OF APPEAL.]

AKTIESELSKABET OLIVEBANK *v.* DANSK SVOVLSYRE FABRIK.

[1917 A. 10.]

Ship—Bill of Lading—Alternative Ports of Discharge—Option of Consignee—Choice of impossible Port—Discharge at possible Port—Shipowner's Right to Freight.

A charterparty provided that the plaintiffs' vessel should proceed with a cargo of nitrate to one of several ports in the United Kingdom for orders to discharge at a safe port in the United Kingdom or one of several named ports in Denmark, arrest and restraints of princes being mutually excluded. When the vessel arrived at one of the ports for orders, the defendants, holders of a bill of lading which incorporated the above terms of the charterparty, ordered her to one of the named Danish ports, which had become an impossible port owing to the fact, known to the defendants, that the further importation of nitrate into Denmark had been prohibited by the British Government. The master, being unable to go to the port ordered, discharged the cargo in the United Kingdom. In an action against the defendants for freight:—

Held, that it was an implied term of the bill of lading that the defendants should order the ship to a possible port and so give the plaintiffs an opportunity of earning freight, and that, as the defendants had failed to do this, the plaintiffs were entitled to discharge the cargo where they did and to claim freight.

Judgment of Bailhache J. [1919] 1 K. B. 388 affirmed.

APPEAL from the judgment of Bailhache J. reported [1919] 1 K. B. 388.

The plaintiffs were the owners of the Norwegian sailing vessel *Springbank*. By a charterparty dated June 24, 1915, between the plaintiffs and Messrs. Andrew Weir & Co., the charterers, it was agreed that the vessel, then being at Copenhagen, should proceed to load at any safe port not north of Iquique nor south of Taltal a full cargo of nitrate of soda and should "therewith proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at a safe port in the United Kingdom (excluding Manchester Canal) or so near thereunto as she may safely get always afloat . . . . and there deliver the same on being paid freight at and after the rate of 60*s.* if discharged at a safe port in the United

Kingdom after calling for orders, or 65*s.* if discharged [at] Aarhus, Aalborg, Elsinore, or Copenhagen after calling for orders or at Dunkirk at 62*s.* 6*d.* or Nantes or La Pallice at 65s. or Rotterdam at 65*s.* sterling in full per ton of 2240 lbs. averdupois gross English weight delivered." . . . . By Clause 10 of the charterparty the ship was to be discharged at the average rate of 200 tons if in the United Kingdom from the time she was in berth. By Clause 11 should she be detained by the charterers beyond the time specified for discharging demurrage was to be paid daily to the master at the rate of 3*d.* per register ton British sterling or equivalent per day for each and every day's detention afterwards, such detention not to exceed ten running days. By Clause 12 arrest and restraints of princes, rulers, and people were mutually excluded.

Under this charterparty the vessel proceeded to Caleta Caloso and there took on board a cargo of nitrate of soda in bags shipped by the charterers' agents under a bill of lading dated January 18, 1916, stating that the vessel was "bound for Queenstown, Falmouth, or Plymouth for orders" and that the cargo was "to be delivered . . . . at the port of discharge," arrest and restraints of princes, rulers, and people excepted, unto the Agnas Blancas Nitrate Co., Ltd., or their assigns. "Payment of freight and all other conditions" were to be "as per charterparty dated in London June 24, 1915."

The defendants were indorsees of this bill of lading to whom the property in the cargo had passed.

The vessel sailed from Caleta Coloso on January 18, 1916, and arrived at Falmouth on May 7, 1916. At this time the British Government had introduced a system of restricting the amount of nitrate of soda which might be imported into certain neutral countries, including Denmark, and had limited the amount to be imported into that country to 33,000 tons a year; and this amount had to the knowledge of the defendants already been exceeded. Notwithstanding this, on May 10 they ordered the vessel to Aalborg in Denmark knowing that she would not be allowed to proceed thither

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without a licence from the British Government and having good reason to believe that no such licence would be granted. In fact no licence was granted until the following November.

The captain refused to proceed to Aalborg. On June 15, as the defendants would give him no further orders, he took the vessel to Plymouth where he discharged the cargo and placed it in a warehouse subject to a claim for freight and demurrage or detention under s. 493 of the Merchant Shipping Act, 1894. The discharge was completed on July 22.

The plaintiffs claimed freight and damages for detention at the rate mentioned in the charterparty. The defendants counterclaimed for damages for the alleged failure of the plaintiffs to complete the voyage to Aalborg.

Bailhache J. held that in ordering the ship to Aalborg the defendants were naming a port which was known to be an impossible port and one not likely to become possible within any reasonable time, and that by so doing they in substance failed to exercise their option to name a port of discharge. He therefore gave judgment for the plaintiffs both on the claim and on the counterclaim.

The defendants appealed.

Leck K.C. and *A. Neilson* for the appellants. Under this charterparty and bill of lading Queenstown, Falmouth, or Plymouth are ports of call. A port of call is not a port of discharge. The goods were to be delivered at "the port of discharge." If a charterparty gives the charterer the right to choose one among several named ports as the port of discharge, without any qualification as to safety or otherwise, when he or the holder of the bill of lading names one of those ports that becomes the port of discharge named in the charterparty. This charterparty in effect does that. It does not provide for a safe port or an open port, but in effect names Aarhus, Aalborg, Elsinore, Copenhagen, and others as optional ports of discharge. When the appellants named Aalborg, that became the port of discharge as if Aalborg had been named in the charterparty as the port of discharge: *Tharsis*

Sulphur and Copper Co. v. *Morel Brothers & Co.* (1) Bailhache J. based his judgment on certain words of Bowen L.J. in that case, namely, "The most that can be said is that the charterer does not exercise his option at all unless he chooses a berth that is free or is likely to be so in a reasonable time" (2); but in that case the contract of the shipowner was to deliver "at any safe berth as ordered." As Bowen L.J. also said in the same case (2), "To limit the option of the charterer by saying that, in the choice of a berth, he is to consider the convenience of the shipowner, is to deprive him of the benefit of his option." In the present case the charterparty did not provide for a safe port or an open port for discharge, but it did contemplate Aalborg as a port of discharge. The appellants named it, and so it became the port of discharge.

If a particular port is named in the charterparty, and that port becomes impossible through restraint of princes, the shipowner is excused from proceeding to that port, but he does not earn his freight: *Ogden* v. *Graham* (3) per Blackburn J.; *St. Enoch Shipping Co.* v. *Phosphate Mining Co.* (4)

The Teutonia (5) is distinguishable, for there the ship was to proceed to any safe port within certain limits; the holders of the bill of lading ordered her to an unsafe port, and refused to name a safe port. Therefore, as they in effect declined to exercise any option, the shipowner earned his freight by taking the ship to a safe port within the named limits. In the present case there was no stipulation that the Danish ports should be safe, and the respondents, not having performed the voyage contracted for, are not entitled to any freight.

R. A. Wright K.C. and *Le Quesne* for the respondents. The appellants, having an option as to which of several ports they will name as the port of discharge, were bound to make a bona fide election by naming "one into which admittance could be procured": *Dahl* v. *Nelson, Donkin & Co.* (6); *Ogden* v. *Graham* (7); *Tharsis Sulphur and Copper Co.* v.

(1) [1891] 2 Q. B. 647.
(2) [1891] 2 Q. B. 647, 652.
(3) (1861) 31 L. J. (Q. B.) 26, 29.
(4) [1916] 2 K. B. 624.
(5) (1872) L. R. 4 P. C. 171.
(6) (1881) 6 App. Cas. 38, 44.
(7) 31 L. J. (Q. B.) 26; 1 B. & S. 773.

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Morel Brothers & Co. (1); *Mitchell, Cotts & Co.* v. *Steel Brothers and Co.* (2) If one of the named ports had been to their knowledge destroyed by earthquake, they could not have named that port. To do so would be a pretence, and not a real exercise of their option. It cannot be that, if one of several optional ports becomes impossible, the consignee may name that port and so evade payment of freight. It makes no difference whether the word "safe" is or is not used in relation to a port: *Ogden* v. *Graham* (3) per Wightman J. The appellants having failed to exercise their option, the respondents were within their rights in taking the ship to one of the named ports which was possible; and by so doing they earned their freight: *The Teutonia.* (4) It follows that they are entitled to demurrage and damages for detention to the amount proved.

Leck K.C. in reply.

BANKES L.J. This case raises a question of general importance. It is a claim for freight or damages in lieu of freight. Bailhache J. gave judgment for the shipowners, the respondents. He said there was no authority directly in point, but after referring to a passage from the judgment of Blackburn J. in *Ogden* v. *Graham* (5), and to some observations of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (6), he said (7): "I think the proper inference from those judgments, and certainly the bent of my own mind if there were no authority on the subject at all, is that under circumstances like those in the present case, the nomination of Aalborg as the port of discharge, when it was perfectly well known that the ship could not proceed there because of the restriction on the carriage of nitrates from the United Kingdom to Denmark, was in truth and in fact no exercise of the option at all. It was a mere nugatory nomination, and one which could not possibly be acted upon. I have come to the conclusion that, under the circumstances existing at the time when the *Springbank*

(1) [1891] 2 Q. B. 647.
(2) [1916] 2 K. B. 610.
(3) 31 L. J. (Q. B.) 26; 1 B. & S. 773.
(4) L. R. 4 P. C. 171.
(5) 31 L. J. (Q. B.) 26, 29.
(6) [1891] 2 Q. B. 647, 652.
(7) [1919] 1 K. B. 372.

arrived at Falmouth, and was entitled to orders, it was the duty of the defendants to give her orders, within the limits of the ports mentioned in the charterparty, to go to some port to which she could proceed within a reasonable time." I agree; though it is possible to base the decision on somewhat different grounds. Having regard to the form of the bill of lading and the charterparty, which provided that the ship should proceed to a port in the United Kingdom for orders and then indicated that orders might be given to a range of ports including British as well as continental ports by naming the rate of freight to be paid according as one port or another is named as the port of discharge, I think that the principle of the *Moorcock* (1) and *Hamlyn & Co.* v. *Wood & Co.* (2) applies, and that the parties must have intended that of the range of ports one or another should be chosen which would give the shipowners an opportunity of earning their freight, especially when it is borne in mind that a shipowner is not entitled to any freight unless he completes the agreed transit. I prefer to base my judgment upon the ground that there was such an implied term, and that it was a breach of that implied term to order the vessel to a port which, to the knowledge of those who gave the order, the vessel could not proceed to. I think the contract contained that implied term notwithstanding the exception of restraint of princes. I only desire to add that the learned judge held that the adventure was frustrated within the meaning of that phrase in *Jackson* v. *Union Marine Insurance Co.* (3) He also held that the shipowner was entitled to damages for detention of the ship. I agree with the learned judge on both these points. The result is that the appeal must be dismissed.

WARRINGTON L.J. I am of the same opinion. In this case the plaintiffs claim damages for the breach by the defendants of their obligation to give effective orders as to the port of discharge whereby the plaintiffs were prevented from earning the freight. The defendants deny the breach and counterclaim

(1) (1889) 14 P. D. 64. (2) [1891] 2 Q. B. 488.
(3) (1874) L. R. 10 C. P. 125.

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for damages for failure to complete the contract voyage. The learned judge has adopted the plaintiffs' view and has given them judgment for 14,000*l.* damages with the costs of the action and counterclaim. The defendants appeal.

The charterparty was dated June 24, 1915. The ship was to proceed to Queenstown, Falmouth, or Plymouth for orders to discharge at certain ports including, as is conceded on the construction of the charterparty, the port of Aalborg in Denmark. Separate rates of freight were fixed for the United Kingdom and for Denmark, and the charterparty contained the usual provisions as to demurrage, and the exceptions clause including restraint of princes. The bill of lading was dated January 18, 1916, and the ship was therein described as bound for Queenstown, Falmouth, or Plymouth for orders. Payment of freight and all other conditions as per charterparty. The form of the bill of lading was due to the fact that at this time the British Government would not allow cargoes of nitrate of soda to proceed to Denmark without their permission. I think that the true inference from the facts is that the shipowners as well as the sellers and the defendants knew that the cargo was one as to which the British Government might refuse permission.

The ship arrived at Falmouth on May 7, 1916, and on May 10 the defendants gave her orders to proceed to Aalborg. They had not then obtained, and they failed within a reasonable time to obtain, the permission of the British Government, and the vessel was therefore unable to proceed to that port. No other orders were given, and ultimately in July the cargo was discharged at Plymouth into warehouse subject to a lien for freight.

In these circumstances the defendants contend that, having selected one of the named ports, that port became the port of discharge just as if it had been named as such in the bill of lading itself. All they ask in this court is to have the judgment set aside and judgment entered for them on the claim on the footing that the venture has failed by restraint of princes and neither party can recover against the other.

The learned judge has held on the authority of *Ogden* v.

Graham (1) and the remarks of Bowen L.J. in *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (2) that by naming a port to which it was impossible for the ship to proceed the defendants failed to exercise the option given to them by the bill of lading, and failed to fulfil their obligation to give effective orders as to the port of discharge, thereby preventing the ship from earning the freight and causing other injury and expense. In my opinion the view of the learned judge was correct and his judgment ought to stand. The appeal should therefore be dismissed.

Duke L.J. I agree. In my opinion the obligation of the shipper in this case was to nominate a port to which it was possible in a business sense that the vessel should proceed and at which she could discharge. The nomination of Aalborg, with the knowledge that the appellants had, was an impossible nomination. They knew well that the voyage to Aalborg from Great Britain never could begin. That being so, upon the authority of *Tharsis Sulphur and Copper Co.* v. *Morel Brothers & Co.* (2); *The Teutonia* (3); and *Ogden* v. *Graham* (1), the appellants have failed in their obligation to the shipowners to nominate a port in pursuance of their duty under the charterparty and bill of lading, and must pay damages at the rate specified in the charterparty and also compensation for such detention of the vessel as occurred.

Mr. Leck relied upon the following words, which are to be found in the judgment of Blackburn J. in *Ogden* v. *Graham* as reported in the Law Journal (4): "If at the time the place had been named the port had been open, or if that particular port had been mentioned in the contract itself, and the port had been found closed before the ship could enter, then the shipowner would have been saved from being obliged to go in by the clause of exception as to the restraint of princes and rulers." Thence Mr. Leck argued that, Aalborg being, as he said, in effect named in this charterparty and so named in the contract, Blackburn J. would have held in this case

(1) 31 L. J. (Q. B.) 26.
(2) [1891] 2 Q. B. 652.
(3) L. R. 4 P. C. 171.
(4) 31 L. J. (Q. B.) 29.

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that Aalborg was a good nomination. In my opinion the words attributed to Blackburn J. do not bear the meaning Mr. Leck sought to give them. If they did, they would be in conflict with the opinion of Wightman J., with whom Blackburn J. declared himself in agreement. The passage on which Mr. Leck relies does not appear in the report of *Ogden* v. *Graham* in Best and Smith (1), and the judgments of both the learned judges are in effect based upon the same argument. If Blackburn J. used the words attributed to him, I take them to mean that if the port which was found impossible had been the only port named in the contract, the shipowners would have been excused by the exception as to restraint of princes. As Aalborg was not the only port named those words have no application to the present case.

Appeal dismissed.

Solicitors for appellants: *W. A. Crump & Son.*
Solicitors for respondents: *Botterell & Roche.*

(1) 1 B. & S. 773.

W. H. G.

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1919
April 2.

Prevention of Corruption Act, 1906 (6 *Edw.* 7, *c.* 34), *s.* 1—*Giving untrue Document to Agent—Intention of Giver to mislead Principal—Whether Agent's corrupt Knowledge of Falsity is an essential Ingredient in Offence by Giver.*

It was the practice of the Metropolitan Water Board to allow to the owners of house property a deduction from the water rates in respect of such portions of their property as had been empty during the quarter for which the rates were payable. The respondent, the owner of a block of chambers, handed to an agent of the Board a "claim for empties," in which he fraudulently represented that portions of the block had been empty for longer periods than was in fact the case, whereby he obtained a larger allowance than he was entitled to. The agent was not aware that the statements in the claim were untrue. The respondent was summoned under the third paragraph of s. 1, sub-s. (1.), of the Prevention of Corruption Act, 1906, which provides that "If any person knowingly gives to any agent . . . . any . . . . document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal," he shall be guilty of an offence.

The two preceding paragraphs of that sub-section respectively make it an offence in an agent "corruptly" to accept a bribe in connection with his principal's business, and in a third person "corruptly" to give or offer a bribe to an agent in a similar connection:—

Held, that the paragraph under which the respondent was summoned is not limited either by the title of the Act or by the context of the two preceding paragraphs to cases in which the defendant acts corruptly, and that neither the corruption or attempted corruption of the agent nor his knowledge of the falsity of the statement was a necessary ingredient in the offence charged.

CASE stated by a metropolitan police magistrate.

An information was laid by the appellant G. C. Sage against the respondent charging that he knowingly gave a form of claim for empties in respect of water rates payable by owners to an agent of the Metropolitan Water Board which was false in a material particular and was intended to mislead the Water Board contrary to s. 1, sub-s. (1.) of the Prevention of Corruption Act, 1906. (1)

(1) By the Prevention of Corruption Act, 1906, s. 1, sub-s. (1.):—"If any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person for himself or for any other person,

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At the hearing of the information the following facts were proved or admitted :—

The appellant is a local receiving officer of the Water Board. The respondent is the owner of a block of buildings known as St. Mary's Chambers, Strand, and pays to the Board the water rates thereon.

Under the terms of a resolution dated June 19, 1908, it is the practice of the Board in cases where water rates are payable by owners to make a certain allowance in respect of any portion of the property which has been empty during any part of the quarter in respect of which the rate is being paid, provided that a form of " claim for empties " furnished for the purpose is sent in by the owner giving the description of the property and the actual period of non-occupation in respect of which the allowance is claimed.

On July 8, 1918, the respondent called at the office of the Board in West End Lane, Hampstead, and handed to H. G. Fitt, the receiving officer there, a claim for empties in respect of six separately assessed tenements for the half year from January 1 to June 30, 1918, duly filled up and signed by the respondent. It was not part of the duty of the said H. G. Fitt to read the said document, but in accordance with his duty he forwarded it to the officer responsible for the water rates of the district in which St. Mary's Chambers, Strand, are situated, and this was his only duty in connection with the said document. That office is in Shaftesbury Avenue, and

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any gift or consideration as an inducement or reward for doing or forbearing to do . . . . any act in relation to his principal's affairs or business . . . . or

" If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do . . . . any act in relation to his principal's affairs or business . . . . or

" If any person knowingly gives to any agent, or if any agent knowingly uses with intent to deceive his principal, any receipt, account, or other document in respect of which the principal is interested, and which contains any statement which is false or erroneous or defective in any material particular, and which to his knowledge is intended to mislead the principal;

he shall be guilty of a misdemeanour, and shall be liable on conviction to imprisonment, with or without hard labour, for a term not exceeding two years, or to a fine not exceeding 500*l*."

the registration officer there is the appellant. Acting upon the assumption that the number of weeks during which the said tenements were stated in the said form to have been empty was accurately stated, the appellant calculated that the proper allowance for empties to be made was 1*l.* 10*s.* 10*d.*, and the final notice for water rate was consequently reduced from 25*l.* 18*s.* to 24*l.* 7*s.* 2*d.*, which latter amount was paid by the respondent who received an official receipt.

Of the said sum of 1*l.* 10*s.* 10*d.* allowed to the respondent on the faith of the said "claim for empties" the sum of 19*s.* was attributable to portions of the property improperly claimed as being empty.

It was not suggested on behalf of the prosecution that either the appellant or any other servant or agent of the Board was aware of the falsity of the statement in the said claim.

At the close of the case for the prosecution the magistrate held that no case had been made out. He found that the person to whom the document was handed was an agent of the Board, but that no attempt was made to corrupt him or any other servant of the Board. He was of opinion that the operation of the Act was limited to the prevention of the corruption of agents, and in that opinion he was guided by the title and general phraseology of the Act. He considered that as the agent in this case was a mere channel of communication and entirely without power to influence his principal in the matter he could not possibly have been corrupted and the Act did not apply. He was further of opinion that the word "his" in the phrase "which to his knowledge is intended to mislead the principal" has reference to the agent and not to the giver of the document, with reference to whom the word "knowingly" is already used in the first words of the paragraph. He accordingly dismissed the information.

Travers Humphreys for the appellant. The magistrate was wrong in holding that the giving to an agent of such a document as was given in this case was not an offence under the section unless the agent was corrupted or had a guilty knowledge

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of the falsity of the statements contained in it. The sub-section under which the respondent was charged contains three paragraphs, the first of which makes it an offence for an agent corruptly to receive a bribe, the second makes it an offence for a person corruptly to give a bribe to an agent, while the third, which makes it an offence for a person to give to an agent, or for an agent to use, a false document intended to mislead the principal, omits the word "corruptly." The effect of the magistrate's decision was to read into the paragraph that word which was purposely omitted. He justified doing so by reference to the title of the Act which is "An Act for the better Prevention of Corruption." But the title of an Act cannot be looked at for the purpose of cutting down the plain meaning of the enacting part.

McCall K.C. and *A. F. Clements* for the respondent. The heading or title of an Act "now forms part of the enacting statute and may be considered in determining the scope of the enactment, provided that nothing contained in it may be taken to contradict clear and unambiguous language in the enactment itself": Lord Halsbury's Laws of England, tit. "Statute," s. 199, citing the judgment of Lindley M.R., in *Fielding* v. *Morley Corporation* (1), where he says: "In old days it used not to be so . . . . but now the title is an important part of the Act, and is so treated in both Houses of Parliament." And in *Vacher & Sons* v. *London Society of Compositors* (2) Lord Moulton said: "The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope." In the present case the language of the enacting part is far from clear, and therefore the title "An Act for the better prevention of Corruption" may be looked at; and the inference from that title is that the provisions of the third paragraph of s. 1, sub-s. (1.), were intended to deal with a case where the agent acts corruptly just as much as those of the two first paragraphs. Corruption is not limited to bribery, it includes the case of an agent fraudulently putting a document before his principal with a view to its being acted

(1) [1899] 1 Ch. 1, 4. (2) [1913] A. C. 107, 128.

upon as vouched by him. There can be no offence in the giver of the false document unless the agent also knows of its falsity.

Travers Humphreys in reply.

BRAY J. In this case the respondent called at the office of the Water Board and handed to a man named Fitt, a receiving officer of the Board, a document called a "claim for empties," and there was evidence from which the magistrate would be entitled to infer that that document contained a statement which to his knowledge was false and was intended to mislead the Board. The prosecution claimed that that evidence showed an offence under the third paragraph of s. 1, sub-s. (1.), of the Prevention of Corruption Act, 1906. The magistrate without calling on the respondent for his defence ruled that no case had been made out within the section, upon the ground that there was no evidence that the agent had been corrupted or that there had been any attempt to corrupt him. He was of opinion that the operation of the Act was limited to the prevention of the corruption of agents, and he said that he was assisted in arriving at that conclusion by the title of the Act, which is "An Act for the better Prevention of Corruption." The question we have to decide is whether his decision was right. If the language of the section is quite clear and unambiguous it would not be right for us to alter its construction by reason of the title of the Act. Let us see what the section says. The first paragraph says: "If any agent corruptly accepts or obtains" a bribe he commits an offence. It is clear that corruption is a necessary part of that offence. Then the second paragraph says: "If any person corruptly gives or agrees to give" a bribe to an agent he shall be guilty of an offence. Corruption is necessary there. Then the third paragraph in the statement of the offence created by it contains no reference to corruption. The word "corruptly" which is used in the first two paragraphs is deliberately omitted from the third. It says: "If any person knowingly gives to an agent"—and here the magistrate has found that Fitt was an agent—"any receipt, account, or other document in respect of which the principal is

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interested "—and it could not be disputed that the claim for empties was a document of that description—" and which contains any statement which is false . . . . in any material particular "—there was undoubtedly evidence that it did contain such a statement—" and which to his knowledge is intended to mislead the principal "—there was equally no doubt that it was intended to mislead the Board—he shall be guilty of an offence. As the magistrate had evidence before him of all the facts which go to make up the offence he was wrong in holding that a prima facie case had not been made out, and he ought to have called upon the respondent for his answer. He said that in his opinion the word " his " in the sentence " which to his knowledge is intended to mislead the principal " had reference only to the agent and not to the giver of the document. In that I think he was wrong. In my opinion the word " his " refers to each of them according as the one or the other is the party charged. In my view the words of the Act are perfectly clear and unambiguous. The word " knowingly " is deliberately used in the third paragraph instead of the word " corruptly," and " knowingly " does not necessarily involve any element of corruption. The substitution of the word " knowingly " was probably made because of the great difficulty of proving corruption, and it was thought advisable in a case of the kind dealt with in that paragraph to make the act an offence whether it was done corruptly or not. Under those circumstances we have no right to restrict the plain meaning of the words merely because the Act is entitled " An Act for the better Prevention of Corruption." The case of *Vacher & Sons* v. *London Society of Compositors* (1) which was referred to by Mr. McCall certainly does not support his contention. The passage relied on is in the judgment of Lord Moulton where he says : " The title of an Act is undoubtedly part of the Act itself, and it is legitimate to use it for the purpose of interpreting the Act as a whole and ascertaining its scope. This is not the case with the short title, which is in this instance 'The Trades Disputes Act, 1906.' That is a title given to

(1) [1913] A. C. 107, 128.

the Act solely for the purpose of facility of reference. If I may use the phrase, it is a statutory nickname to obviate the necessity of always referring to the Act under its full and descriptive title. It is not legitimate, in my opinion, to use it for the purpose of ascertaining the scope of the Act. Its object is identification and not description." That was a case in which a general provision in the Act that no action or tort should lie against a trade union was sought to be cut down by reference not to the full title but to the short title. The question whether the full title can be looked at for the purpose of explaining the language of the enacting part where it is free from ambiguity did not there arise. In my opinion the magistrate's decision was wrong in law, and the case must go back to him to be heard.

LAWRENCE J. I am of the same opinion. I quite agree that the title of an Act is of importance wherever the words of the enacting part are at all ambiguous, but no use can be made of it where the meaning of those words is plain. In the case before us I do not think that Mr. McCall has sufficiently explained the absence of the word "corruptly" from the third branch of this sub-section. The word "corruptly" is used in the first and second branches, and, as my Lord has pointed out, is deliberately omitted from the third. That omission is to my mind readily explained by the fact that it is frequently found impossible to prove that an agent has been corrupted; and in view of that difficulty it was thought sufficient, in order to establish an offence on the part of the giver, to prove that he knowingly gave to an agent a document which contained a statement that was false, erroneous, or defective, intending it to mislead the principal, to prove that the agent, knowing that the document was false, used it with intent to deceive his principal. It seems to me therefore that this is a case in which the magistrate ought to have heard the whole of the evidence. I do not agree with him in thinking that the word "his," towards the end of the third paragraph of s. 1, sub-s. (1.), applies only to the agent. It applies to either the agent or the giver of the document, according to the

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Lawrence J.

circumstances. If it applied only to the agent the provision would be redundant, for the necessity of the agent doing the act "knowingly with intent to deceive his principal" has already been dealt with in the earlier part of the paragraph. I agree that the appeal must be allowed.

SHEARMAN J. I am of the same opinion. This is another of those cases in which an attempt is made to cut down the plain meaning of a statute by referring to the preamble or the title. It has happened more than once that a certain abuse has brought a new statute into existence, which has proceeded to deal not only with that particular abuse but also with certain kindred abuses, and it has then been sought to restrict its application to the particular abuse which caused it to be passed. A case very much like the present was *Reg.* v. *Stoddart.* (1) In that case the defendant was charged under the Betting Act, 1853, with keeping an office for the purpose of certain transactions in connection with horse racing, which were not betting transactions, but which nevertheless literally came within the prohibition of one of the sections. It was held that the plain words of the section could not be cut down by reference to the title and preamble which purported to deal only with the suppression of betting houses. I think that the words here are quite plain and that the magistrate should have gone on to hear the respondent's case, and see whether there should not be a conviction.

Appeal allowed.

Solicitor for the appellant: *Walter Moore.*
Solicitor for the respondent: *John Hands.*

(1) [1901] 1 K. B. 177.

J. F. C.

ELDER *v.* KELLY.

1919
April 4.

Sunday—Sale of Milk on, during prohibited Hours—Illegality of—Effect of Illegality on Prosecution for Adulteration—Sunday Observance Act, 1677 (29 *Car.* 2, *c.* 7), *ss.* 1, 3.

Though the effect of a contravention of the Sunday Observance Act, 1677, upon a contract of sale is to avoid it, in the sense that it cannot be sued upon in a civil action, it does not avoid it so far as to relieve the seller from liability to prosecution if the article sold, being an article of food, was adulterated.

CASE stated by justices of Durham.

An information was laid by the appellant B. S. Elder, the Chief Inspector of Weights and Measures for the said county, against the respondent, Ernest Kelly, charging him with having sold to one F. W. Benson a pint of milk deficient in non-fatty solids contrary to s. 6 of the Sale of Food and Drugs Act, 1875.

At the hearing of the information it was proved that the appellant, by his assistant F. W. Benson, did on Sunday, November 17, 1918, at 10 A.M., in the parish of St. Oswalds, purchase from the respondent a milkseller one pint of new milk.

The justices were of opinion that the appellant's assistant in purchasing the milk was a person doing and exercising worldly labour business or work of his ordinary calling on the Lord's Day after 9 A.M. (not being a work of necessity and charity) and that consequently the sale and purchase of such milk was illegal and void. (1) Upon that ground they dismissed the information.

(1) By s. 1 of the Sunday Observance Act, 1677, "No tradesman artificer workman labourer or other person whatsoever shall do or exercise any worldly labour business or work of their ordinary callings upon the Lord's Day or any part thereof (works of necessity and charity only excepted); and every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of five shillings."

Sect. 3: "Provided that nothing in this Act contained shall extend to the . . . . selling of milk before nine of the clock in the morning or after four of the clock in the afternoon."

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Paley Scott for the appellant. If either of the parties to a contract of sale entered into on a Sunday be one of the class of persons specified in the Sunday Observance Act the contract will no doubt be void so that it cannot be sued upon: *Smith* v. *Sparrow* (1); *Fennell* v. *Ridler*. (2) Here the respondent was a milkseller, and as such was admittedly within the class. But the fact that the contract of sale was void for the purposes of a civil action does not show that it was void for all purposes. The property in the milk must have passed. There was a sufficient sale to satisfy the requirements of s. 6 of the Sale of Food and Drugs Act which makes it an offence to sell to the prejudice of the purchaser any article of food which is not of the nature substance and quality of the article demanded. There is no authority for the proposition that a contract which is bad under the Sunday Observance Act cannot be the subject of a prosecution for infringement of another statute. It cannot be that a man can sell adulterated food on Sunday with impunity.

Simey for the respondent. For the prosecution to succeed under s. 6 of the Sale of Food and Drugs Act it must be proved that the respondent sold the milk. But a contract of sale which is void is not a sale at all. If it is void as between vendor and purchaser it must be void for all purposes. In *Rex* v. *Whitnash Inhabitants* (3), where the question was whether service under a contract of hiring made on a Sunday between a farmer and a labourer could confer a settlement, it was indeed held that it could because the making of such a contract was no part of the ordinary calling either of the farmer or the labourer; but it was conceded that if the case had come within the Sunday Observance Act not only would the contract have been avoided as between the parties but the settlement would have gone with it. In *Scarfe* v. *Morgan* (4) the plaintiff sent a mare to the defendant, a farmer, on a Sunday to be covered by a stallion. The charge for covering not having been paid the defendant claimed to detain the mare under a lien. In an action of trover it was held that the contract

(1) (1827) 4 Bing. 84.
(2) (1826) 5 B. & C. 406.
(3) (1827) 7 B. & C. 596.
(4) (1838) 4 M. & W. 270.

was not void under the Sunday Observance Act, on the ground that it had not been made by the defendant in the exercise of his ordinary calling; but that, even if it were, the contract having been executed, the lien attached. It is admitted that that case is against the respondent's contention.

Paley Scott was not called on to reply.

BRAY J. In this case I am of opinion that the appeal should succeed. The respondent was prosecuted under s. 6 of the Sale of Food and Drugs Act, 1875, which makes it an offence for any person to sell to the prejudice of the purchaser any article of food not being of the nature substance and quality demanded by him. It was not disputed that the sale here, if there was one, was to the prejudice of the purchaser, but it was said that there was no sale. It was contended that the transaction was unlawful and void by reason of its being in breach of the Sunday Observance Act. I think it is quite clear that the statute rendered it unlawful, as the vendor was exercising his ordinary calling of a milkseller, and I agree that as the purchaser was privy to the illegality both parties committed an offence. The effect of that illegality no doubt was to prevent either party from enforcing the contract. But it is untrue to say that the transaction had no operation at all. What I understand to have happened was that the appellant's assistant came to the shop, asked for some milk, received it, paid for it, and took it away. In my opinion that transaction clearly operated to pass the property in the milk from the seller to the appellant, and it was to that extent an effective sale. But it was further contended that as the appellant was himself a party to the illegality he cannot be allowed to prosecute. The answer is that the appellant is not the prosecutor. The prosecutor is the Crown, and the Crown is not affected by any unlawful act that the appellant may have done. The case must go back to the magistrates with an intimation that the statute is no answer to the prosecution.

LAWRENCE J. I am of the same opinion. I think the

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vendor of this milk is estopped from setting up his own breach of the Sunday Observance Act as a defence to the prosecution. It cannot be that the effect of that Act is to enable a person to sell bad milk on Sunday between the hours of 9 and 4 with impunity. It would be ridiculous to suppose that when a man has committed two offences against different statutes the commission of one of those offences could be any answer to a prosecution for the other.

SHEARMAN J. I am of the same opinion. By the Sunday Observance Act, 1677, certain transactions were forbidden under a fine, and that is one of those statutes which by the imposition of a fine render the prohibited transaction illegal and void, in the sense that neither party to the transaction, if privy to the illegality, can sue upon it in a civil action or enforce any right under it. But that does not involve the conclusion that it is so far void as to prevent the Crown from taking criminal proceedings upon it. The seller of the milk no doubt could have been fined for selling it during prohibited hours, but that does not show that the property in the milk did not pass to the purchaser so that he might lawfully have drunk it. It was clearly a sale, and that sale could be proved in a criminal case. I agree that the case must go back.

Appeal allowed.

Solicitors for the appellant: *Sharpe, Pritchard & Co., for H. Jevons, Durham.*

Solicitors for the respondent: *Smith, Rundell & Dods, for Wooler & Wooler, Darlington.*

J. F. C.

[IN THE COURT OF APPEAL.]

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Revenue—Excess Mineral Rights Duty—Pre-war Rent Value—"Average prices governing payment of rent"—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 43, *sub-ss.* 1, 2—*Costs—Proceedings before Referee—Costs of successful Appellant—Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 33, *sub-s.* 3.

By s. 43 of the Finance (No. 2) Act, 1915, where rent varies as the price of minerals and exceeds the pre-war standard of that rent there shall be paid by the person to whom the rent is payable an amount equal to half the excess. The pre-war standard is the average of two pre-war rent values. The pre-war rent value for either of those years is "the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that [the pre-war] year."

By the terms of a lease the lessee was to pay a certain royalty per ton when the average selling price of coal did not exceed 6*s.* 6*d.* per ton. When the average selling price exceeded 6*s.* 6*d.* per ton the royalty was to be increased by one-tenth of the excess. On April 14, 1914, before the commencement of the war, the parties agreed to raise the basis of the average selling price from 6*s.* 6*d.* to 7*s.* 6*d.* per ton:—

Held, that the basis of 6*s.* 6*d.* per ton fixed by the lease was one of "the average prices governing the payment of the rent" in the pre-war years, and that the pre-war rent values must be arrived at by ascertaining what the tonnage raised in the accounting year would have yielded by way of royalties in the pre-war years, taking 6*s.* 6*d.*, and not 7*s.* 6*d.*, as the basis of the average selling price in those years.

Decision of Lush J. [1917] 2 K. B. 760 affirmed.

On an appeal to a referee under s. 33 of the Finance (1909-10) Act, 1910, against an assessment in respect of excess mineral rights duty the referee decided in favour of the appellants' contention, but declined to make any order as to costs. On appeal Lush J. affirmed the decision of the referee, but refused to interfere with his order as to costs. On appeal the Court of Appeal affirmed the decision of Lush J. on the main point. On a cross-appeal by the respondents to the appeal as to the costs of the proceedings before the referee:—

Held, that the respondents had shown no special circumstances to justify the Court in interfering with the discretion of the referee under s. 33, sub-s. 3, of the Act, which had been judicially exercised by him.

APPEAL from a decision of Lush J. (1) affirming a decision of a referee under s. 33, sub-s. 4, of the Finance (1909–10)

(1) [1917] 2 K. B. 760.

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Act, 1910 (10 Edw. 7, c. 8), and s. 43 of the Finance (No. 2) Act, 1915 (1), as to the amount of excess mineral rights duty payable by the respondents, the trustees of the Earl of Lonsdale's settled estates, under the last-mentioned section.

The parties agreed in the following statement of facts: 1. By an indenture of lease dated May 1, 1903, and made between the Right Hon. Hugh Cecil, Earl of Lonsdale, of the first part, the Right Hon. James Lowther, M.P. (the then trustee of the settled estates of the said Earl), of the second part, and the St. Helen's Colliery and Brickworks Co., Ltd., of the third part, certain coal mines and deposits of coal under lands (including foreshore) situate in the borough of Workington and the parishes of Seaton and Flimby, Cumberland, were demised to the company for a term of fifty-nine years (less three days) from January 1, 1903, at the yearly

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 43:—

"(1.) Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves (in cases where the right to work the minerals and the mineral wayleaves are not part of the assets of any trade or business) varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section referred to as the person liable) an amount equal to fifty per cent. of that excess.

"(2.) The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year. . . . .

"(5.) Any duty payable under this section shall be assessed by the Commissioners of Inland Revenue on the person liable, subject to the same appeal as that to which an assessment of duty by the Commissioners under Part I. of the Finance (1909-10) Act, 1910, is subject, and shall be recoverable as a debt due to His Majesty from that person.

"(6.) Sub-section (3) of section twenty of the Finance (1909-10) Act, 1910, shall extend so as to authorise particulars to be required of any lease of minerals or wayleaves and as to the sums paid or payable thereunder, and of such other particulars as to the minerals or wayleaves as the Commissioners may require for the purpose of this section. . . . ."

dead or certain rent of 1000*l.* payable half-yearly, and the lease provides that this dead rent shall merge in the following royalty rents specified in the schedule to the lease :—

When the average selling price of the coal does not exceed 6*s.* 6*d.* per ton :—

For coal from the Main Band ..	A royalty of	6*d.* per ton
For coal from Bannock Band, otherwise Ten Quarters ..	„	5*d.* „
For coal from other seams ..	„	3*d.* „

When the average selling price exceeded 6*s.* 6*d.* per ton the above royalties were to be increased by one-tenth of the excess above 6*s.* 6*d.* per ton of such average selling price. "The average selling price" is defined by the lease, a copy of which forms part of this statement.

2. The dead rent has been always exceeded by the tonnage royalties, and the amount of the dead rent does not affect the present question.

3. The basis selling price of 6*s.* 6*d.* fixed by the lease has also been exceeded at all material times. Before the commencement of the present war, i.e., on April 23, 1914, as a result of negotiations for a reduction in the royalties payable by the company, the trustees agreed to make to the company as from January 1, 1914, a reduction in the royalties, and this was effected by raising the basis selling price of 6*s.* 6*d.* fixed by the lease to 7*s.* 6*d.* per ton, the trustees thus making as from January 1, 1914, a reduction of one-tenth of 1*s.* per ton in all the royalties payable under the lease when the selling price is 7*s.* 6*d.* or upwards. The Commissioners had no knowledge of this agreement until the return dated March 22, 1916, referred to in para. 6 below, was received from the trustees.

4. The increased basis selling price of 7*s.* 6*d.* has always been exceeded since January 1, 1914.

5. The trustees' royalty account for the half-year ending June 30, 1914, was, and all subsequent accounts have been, made up and the royalties charged on the basis of the agreement mentioned in para. 3 hereof.

6. On January 26–27, 1916, the Commissioners served

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notice on the trustees' agent at Whitehaven requiring particulars under the statute as to excess mineral rights duty, and on March 22, 1916, particulars were furnished by the agent.

7. The year ending December 31, 1914, is the first accounting year.

8. The two years immediately preceding the first accounting year, i.e., the years ending December 31, 1912, and December 31, 1913, were under s. 43, sub-s. 2, of the Finance (No. 2) Act, 1915, selected by the agent for the purpose of finding the pre-war standard for the return. That selection is not affected by the matter in dispute, i.e., the method of computing the pre-war rent values. In the particulars referred to in para. 6 hereof the average rate of royalty payable in the selected pre-war years for each seam was required by the Commissioners and was furnished by the agent. The average rate of royalty so furnished was calculated according to the terms of the lease unmodified by the agreement mentioned in para. 3 hereof.

9. The Commissioners on April 28, 1916, served upon the trustees' agent the computations of liability to excess mineral rights duty for the years 1914 and 1915 which are herewith and marked B^1 and B^2. In these computations the Commissioners calculate the pre-war standard of rent by reference to the terms of the lease as modified by the agreement referred to in para. 3 hereof.

10. A copy of the Commissioners' letter of April 27, 1916, accompanying these computations and of the subsequent correspondence between the Commissioners and the trustees' agent, consisting in all of seven letters, is herewith marked C.

11. The Commissioners' computations accept the agents' tonnage figures for 1914 and 1915, but do not accept his average rates of royalty for the selected pre-war years, though these were the rates actually paid for the selected years.

12. "Rate of royalty" in this and the next paragraph means alternatively—(1.) the rate fixed by the schedule to the lease (see para. 1 above); (2.) the rate as altered by the agreement referred to in para. 3 above. These

rates are referred to as "rate of royalty (1.)" and "rate of royalty (2.)" respectively. The Commissioners and the trustees agree that to arrive at the pre-war standard of rent as defined by the Finance (No. 2) Act, 1915, s. 43, it is necessary to divide by 2 the sum of the two selected pre-war rent values, that is the pre-war rent value of 1912 and the pre-war rent value of 1913. The method of calculation of these pre-war rent values for 1912 and 1913 is the matter in dispute in this case.

The Commissioners contended that those pre-war rent values had to be arrived at as follows: Take the tonnage for each year of account, namely, 1914 and 1915; ascertain what that tonnage would have brought in by way of royalty in the selected years 1912 and 1913 if "rate of royalty (2.)" were applied to the average prices of coal in 1912 and 1913 respectively.

The trustees contended that the pre-war rent values for 1912 and 1913 respectively must be arrived at by taking the tonnage for 1914 and 1915 respectively and ascertaining what that tonnage would have paid by way of royalty in the selected years 1912 and 1913 if the "rate of royalty (1.)" were applied to the average selling price of coal in 1912 and 1913 respectively.

13. [This paragraph set out (1.) the number of tons of coal worked and chargeable with royalty rents during the first and second accounting years ending December 31, 1914, and December 31, 1915, respectively; (2.) the average selling prices of the coal calculated in accordance with the provisions of the lease in each of the two selected years immediately preceding the first accounting year, namely, the two years ending December 31, 1912, and December 31, 1913; (3.) the royalties payable on the tonnage of coal worked during the first and second accounting years, 1914 and 1915, respectively according to the average selling prices of the two selected pre-war years, 1912 and 1913, respectively for each of the selected years—(*a*) applying "rate of royalty (2.)" which brought out the Commissioners' pre-war standard of rent for 1914 as 4222*l.* 7*s.* 10*d.* and for 1915 as 3780*l.* 18*s.* 6*d.*;

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(*b*) applying "rate of royalty (1.)," which brought out the trustees' pre-war standard of rent for 1914 as 4988*l.* 9*s.* 8*d.* and for 1915 as 4470*l.* 6*s.* 2*d.*] . . . .

15. The Commissioners on June 7, 1916, served on the trustees' agent the notices of assessment to excess mineral rights duty for 1914 and 1915, marked D^1 and D^2 herewith. These assessments are based on the Commissioners' computations of liability already referred to. The trustees thereupon gave notice of appeal against the assessment for each of the years 1914 and 1915. Copies of these notices accompany, marked E^1 and E^2.

16. The trustees have never disputed, and do not now dispute, their liability for excess mineral rights duty computed on the pre-war standards of rent set out in para. 13 (3.) (*b*) if any liability for such duty is in fact imposed by the said Act.

The referee decided that the trustees' contention was right, but declined to make any order as to costs, and his decision was affirmed by Lush J., who refused to interfere with the order as to costs.

The Commissioners appealed. There was also a cross-appeal by the respondents as to costs of the proceedings before the referee.

Sir Gordon Hewart A.-G. and *Sheldon* for the appellants. The point in this case turns upon the construction of s. 43 of the Finance (No. 2) Act, 1915. The section is precise, its object being not to tax the total profits but to separate that portion of the rent which is due to the increased price of coal. The difficulty arises in ascertaining in any given case the pre-war standard of rent, which is a notional figure.

What is to be taxed is really the excess profit arising from the increase in the price of the coal.

[SWINFEN EADY M.R. Assuming that the contention of the Crown is right, then if the price and everything else remains constant, but the royalty is put up, there would be nothing to tax ?]

Yes, that is so.

[WARRINGTON L.J. You contend that what is to be regarded

is the circumstances of the accounting year and the average basis price of the selected pre-war years.]

Yes, everything is constant except the price.

The pre-war standard of rent is to be arrived at by taking such a sum as the rent would amount to for the accounting year if the prices of coal had been the same as the average of the selected years, and the rate of the royalty were the same as in the accounting year. You must take the post-war basis selling price of 7*s.* 6*d.* instead of the pre-war basis selling price of 6*s.* 6*d.* for the selected year.

[*Murray* v. *Inland Revenue Commissioners* (1) was referred to.]

Langdon K.C. and *W. Allen* for the respondents. The decision of Lush J. was right. Sect. 43 of the Act of 1915 seeks to disengage what is the increase in the royalty due to the operation of the stipulated prices which determine the amount of the royalty payable to the owner. As to the method by which that result is obtained, the object is to work out a notional royalty by a calculation in which the various figures are actual figures : (*a*) the tonnage gotten in a post-war year is the tonnage on which royalty is to be computed ; (*b*) the average of the prices which in fact determined the payment of the pre-war year (as applied in fact to the pre-war tonnage), i.e., the rate of royalty in the pre-war year. You thus have a notional royalty in which is contained all the benefit received by the owner from the prices of the pre-war year to be compared with the actual royalty received from the prices of the post-war year. Apply this to the actual circumstances of the lease. A basis price is an essential factor in determining the notional royalty for the pre-war year. The selling price alone would not determine the royalty. The price with which the selling price is to be compared is of the essence of the calculation. In other words the royalty depends upon two prices : (*a*) the selling price of the minerals and (*b*) the basis price. Test this first by the result, and secondly by the Act. By the result : In leases of this character (i.) the increase of the royalty by reduction

(1) [1918] A. C. 541.

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of the basis price involves no corresponding liability to tax if the appellants are right, on the other hand, it does, if the respondents are right. (ii.) The reduction of the royalty by the increase of the basis price imposes a burden on the owner, if the appellants are right, but not so, if the respondents are right. (iii.) If the basis price is constant but the prices rise then according to the respondents' view the owner pays. The result is that all increases of royalty whether due to the action of the owner or to the operation of economic law get taxed, according to the respondents' reading. In fact in this case the appellants are endeavouring to make the respondents pay tax in respect of the sum by which the rate of royalty has been reduced.

Take now the Act. Sect. 43, sub-s. 1, is descriptive of the class of cases to which the Act applies. Where the royalty varies with the price of minerals the section is brought into operation. It is unnecessary to use words referring to basis price because the royalty is not computable without it. The words of the sub-section are "the price of the minerals," but you cannot get the amount payable without reference to the basis price of the minerals as fixed by the instrument. The notional royalty is to be estimated with reference to the actual tonnage. Then you have to determine what the royalty would have been if the tonnage had been extracted in the pre-war year. You must have recourse to actual figures, namely, those which appear in the lease—the selling prices obtained by the proprietor over and above the prices in the pre-war year.

The appellants seek to substitute the basis price of the accounting year. It is submitted that that is wrong.

As to the respondents' cross-appeal. Under s. 33, sub-s. 3, of the Finance (1909–10) Act, 1910, the referee is given a discretion as to awarding costs. An appeal from a referee is by sub-s. 4 to the High Court, which has a discretion to give costs. Here the referee has awarded no costs. The Crown appealed to Lush J. who affirmed the decision of the referee. At the hearing before the judge counsel for the respondents asked for the costs of the proceedings before the

referee but the judge refused to make the order. The present cross-appeal is from that refusal.

[*Sheldon* referred to *Matthews* v. *Inland Revenue Commissioners* (1) and *Simpson* v. *Inland Revenue Commissioners*. (2)]

Where an action is brought to enforce a legal right, and there is no misconduct on the part of the plaintiff, the Court has no jurisdiction to refuse him his costs: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3); *Cooper* v. *Whittingham*. (4) Here the respondents have behaved with absolute propriety from first to last. There were no materials before the referee which would entitle him to deprive the respondents of their costs.

[WARRINGTON L.J. The words of s. 33, sub-s. 3, are very special.]

It is submitted that the referee has not exercised his discretion judicially.

[SWINFEN EADY M.R. In the exercise of his discretion the referee has not thought fit to give costs. Can the Court hold that he ought to have done so?]

Yes, where there were no materials on which he could exercise a judicial discretion: *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3); *Higgins* v. *L. Higgins & Co.* (5)

This Court has jurisdiction to interfere with the costs given by a referee. There must be non-judicial conduct on his part, and the question is what is such non-judicial conduct as will justify the Court in interfering with the costs.

[WARRINGTON L.J. In *Civil Service Co-operative Society* v. *General Steam Navigation Co.* (3) it was the defendant who was deprived of his costs.]

Here the respondents are really in the position of defendants. They have been asked to pay a debt which they say is not legally due. Except for machinery they are in the position of a defendant who is sued for a debt which he does not owe. This is a new point.

(1) [1914] 3 K. B. 192.
(2) [1914] 2 K. B. 842.
(3) [1903] 2 K. B. 756.
(4) (1880) 15 Ch. D. 501.
(5) [1916] 1 K. B. 640.

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[*Sheldon.* The point was considered in the House of Lords in *Gray* v. *Lord Ashburton.* (1) *Dicks* v. *Yates* (2) shows the essential difference between the case of a plaintiff and that of a defendant.]

[SWINFEN EADY M.R. referred to *Leckhampton Quarries Co.* v. *Ballinger.* (3)]

Sheldon replied on the main question, no reply being called for as to costs.

Cur. adv. vult.

April 9. SWINFEN EADY M.R. read the following judgment: The amount payable to Lord Lonsdale's trustees as rent in respect of the right to work coal, granted by the lease of May 1, 1903, as varied by the agreement of April 23, 1914, varies according to the price of coal. If, therefore, in any working year ending after the commencement of the war (August 4, 1914), the amount of the rent so payable exceeds the pre-war standard of that rent, 50 per cent. of the excess has to be paid as excess mineral rights duty. There is no difficulty in ascertaining the amount of the rent payable in any accounting year, as this is the actual sum so payable according to the contract between the parties. The pre-war standard of rent, however, is a notional figure, and this appeal raises the question how it ought to be arrived at in the present case.

The appellants contend that it is such a sum as the rent would amount to for the accounting year, if the prices of coal had been the same as the average price of the selected years, and the rate of royalty were the same as in the accounting year. They say that gives the pre-war standard of rent, according to the provisions of the Act.

The respondents insist that to proceed in that manner would be a departure from the Act.

Now, the pre-war rent value is to be arrived at upon a certain hypothesis—"if the rent, so far as variable according to price, were based on the average prices governing the payment of rent in that year." "In that year" obviously

(1) [1917] A. C. 26, 33. (2) (1881) 18 Ch. D. 76, 85.
(3) (1904) 20 Times L. R. 559.

means the selected year and not the accounting year. The rent in the present case is variable, according as the actual sale price exceeds the basis selling price. It is within this margin alone that rent is variable. The extent of the variation can only be measured by regarding both points. The respondents contend that the words "if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year" necessarily involve taking into account all the prices governing the payment of rent in that year, i.e., the selected year, including the agreed basis selling price of 6*s.* 6*d.*; the agreed basis price is one of the essential factors or prices which govern the payment of rent in each year. The appellants indeed, in their calculation, take the agreed basis selling price into account as one of the "prices governing the payment of the rent in that year," but in order to arrive at the pre-war standard, they claim to take the post-war basis selling price of 7*s.* 6*d.* instead of the pre-war basis selling price of 6*s.* 6*d.* for the selected year. The Act fixes the pre-war standard of rent by reference to the prices governing the payment of rent in the selected year. The word "average" before "prices" makes no difference in the construction; it is only applicable as importing the average of the two selected years. Regard is to be had to "the prices governing the payment of the rent," that is to say, the prices which determine the amount of royalty. These prices are two: the agreed basis selling price and the actual or hypothetical selling price. The problem is to ascertain the amount of the excess of rent or royalty.

The Attorney-General insisted that the object of the Act was to identify and disengage that portion of the rent which was attributable to a rise in price of coal, and to tax that portion. The method, however, which he insisted upon extends to tax the landlord upon an amount by which he has lowered the royalty in favour of the tenants. The dispute in the present case is only with regard to this portion of the duty claimed. The whole subject-matter of the contention is the difference in the royalty by the landlord abating

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one-tenth of 1*s.*, or 1.2*d.* per ton, as a concession to the tenants. If one of the prices governing the payment of rent in the selected year, namely, the agreed basis selling price, be omitted, and there be substituted for it the agreed basis selling price for the accounting year, the result is to diminish the notional amount which the landlord would have received in the selected year, and thus increase the apparent excess attributable to the accounting year.

The contention of the Inland Revenue Commissioners disregards the subsisting contract between landlord and tenant and does not arrive at the true sum which the rent would have amounted to, if the figures be worked out on the tonnage of the accounting year but based on the prices governing the payment of rent in the selected year. On the other hand, if effect be given to the contention of the respondents, the true sum is arrived at.

In my opinion the true interpretation of the Act is that of Lush J., giving effect to the contention of the respondents, and the appeal should be dismissed.

We cannot entertain the cross-appeal upon the question of costs. These were in the discretion of the referee. He did not think fit to give them to either party, and no appeal lies from his discretion to our discretion.

WARRINGTON L.J. read the following judgment: A question arises in this case as to the proper mode of calculating that which in the Finance (No. 2) Act, 1915, is called the "pre-war rent value" for the purpose of ascertaining the amount on which excess mineral rights duty is charged by the Act.

Under a lease dated May 1, 1903, of certain coal mines in Cumberland, Lord Lonsdale's trustees are entitled to certain royalty rents. When the average selling price of coal as defined by the lease does not exceed 6*s.* 6*d.* a ton the royalty rent is a fixed number of pence per ton; when that price exceeds 6*s.* 6*d.* per ton the royalties are increased by one-tenth of the excess above 6*s.* 6*d.* per ton of such average selling price.

As from January 1, 1914, the trustees agreed with the lessees to reduce the royalty rent by raising the basis selling

price of 6*s.* 6*d.* mentioned in the lease to 7*s.* 6*d.* This higher basis price has always been reached. The first accounting year under the Act was the year ending December 31, 1914.

The material section of the Act is s. 43, sub-s. 1, which I will read shortly. [His Lordship read the sub-section, omitting immaterial parts, observing that the expression "in that year" it was agreed referred to each of the three pre-war years, and continued:] The Crown contends that in calculating the pre-war rent value the basis price to be employed for the purpose of the calculation is that prevailing in 1914, the accounting year, and not that prevailing in the pre-war year. The referee and Lush J. have both rejected this contention, and the Crown, through the Commissioners of Inland Revenue, appeals.

The question really turns on the true construction of para. 2 of sub-s. 2 of s. 43. The idea in the draftsman's mind appears to be to charge only such part of any excess royalties as is attributable to a rise in the price of the minerals. Accordingly, taking as one limb of the comparison the actual amount of the royalties of the accounting year, he tells you to provide the other limb by ascertaining what the amount would have been if based on the prices of the pre-war year; that is to say, taking the tonnage as the same in both years, the variation is to be obtained by introducing a different price. This price is described as "the average prices governing the payment of the rent in that" [i.e., the pre-war] "year." The insertion of the word "average" really does not affect the construction; it is only inserted in view of the fact that two years are to be selected. The prices which in that year "governed the payment of the rent," i.e., the amount of rent to be paid, were in the pre-war year, first, the average selling prices, and, secondly, the basis price of 6*s.* 6*d.* If you introduce into the calculation the 7*s.* 6*d.* in place of the 6*s.* 6*d.* you are basing it upon a factor of price governing the payment of rent which was in force in the accounting year but not in the pre-war year. This you are told not to do.

In my opinion the judgment of Lush J. was correct and this appeal fails.

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As to the cross-appeal, the referee did not think fit to give any direction as to costs. Unless he does so neither party has even a prima facie right to costs. In the absence of misconduct on his part of which there is no suggestion the judge was, in my opinion, right in refusing to interfere, and the cross-appeal must be dismissed.

SCRUTTON L.J. The question in this case arises on the construction of s. 43 of the Finance (No. 2) Act, 1915, which imposed an excess mineral rights duty. That section is found in a group of sections dealing with excess profits, but it is quite clear that the excess mineral rights duty is not to be computed in any such simple way as finding out what profit the landlord made in the war year as compared with the actual profit that he made in the peace year and taxing the excess. The tax is to be levied in the conventional way set out in the statute, and one has, therefore, to endeavour to ascertain what the words of the statute mean without troubling oneself as to whether the result is just or unjust, with which we have nothing to do.

The tax is to be 50 per cent. of the excess, and the two features fixing the excess are defined by the statute. The tax is only to be levied in the case where the rent payable varies with the price of the minerals, and the two features to be looked at are, first, the amount so payable in the accounting year, being a post-war year, that is, where the rent varies with the price of the minerals, and, secondly, what is called the pre-war standard of that rent. That covers sub-s. 1. Obviously one is in the dark as to the pre-war standard of rent, and one goes then to sub-s. 2 to find the pre-war standard of rent. It is to be the average of any two of the three last pre-war rent values to be selected by the taxpayer. We are still in the dark, because we do not know what the pre-war rent values are, and for that we are sent to para. 2 of sub-s. 2, which contains the words which have to be interpreted in this case. "The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which

the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year," which everybody agrees must mean the pre-war year and not the accounting year. So far as one can understand the intention of Parliament, they seem to have intended to tax the sum which the landlord got at war prices as compared with that which he would have got at peace prices, and they have used particular language. In the first place, they do not trouble about what his output was in peace time. You are to take the output of the accounting year, a post-war year. You know what he gets actually under his agreement as rent on that output. What would he have got if the average prices governing the payment of the rent had been the peace prices instead of the war prices? When one looks at the lease to see what are the prices governing the payment of the rent, and you can only find out from the lease what prices do govern the payment of the rent, one finds that the rent is a royalty of a particular amount per ton when the selling price of the coal is below a particular figure, and when the selling price of the coal exceeds a particular figure it is to be one-tenth of the excess of the price over that particular figure; and the agreed statement of facts three times calls that particular figure the "basis selling price," and that is, as far as I can see, a very accurate description of the figure.

The question in this case arises in this way. In the peace year the basis selling price was 6*s.* 6*d.* At the commencement of the war, for, no doubt, very good reasons, the landlord put the basis selling price higher, to 7*s.* 6*d.*, the result of which was that he would decrease the royalty he received inasmuch as now he would only get 10 per cent. of the excess of the actual price over 7*s.* 6*d.* instead of 10 per cent. of the excess of the actual price over 6*s.* 6*d.* The question in this case is, which I do not suppose was present to the mind of Parliament for a moment when they used this language, what is the average price governing the payment of the rent? Is it merely the selling price of the coal, or does it include also the basis selling price which regulates the amount of the royalty? The first

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phrase "the rent so far as variable according to price" is, I think, very ambiguous, but the second phrase "based on the average prices governing the payment of the rent" appears to me clearly to cover the basis selling price. How do you ascertain what the rent is? You are told the selling price. That does not enable you to get at the rent unless you also know the basis selling price on the excess over which there is to be a particular percentage added to the 6*d.*; and, therefore, looking merely at the words used, and the facts, it seems to me that the basis selling price is an average price governing the payment of the rent in the peace year, and you must see what was the basis selling price in the peace year as well as what was the actual selling price of the coal.

I more readily come to that view if the words are at all ambiguous because the view of the respondents seems to me to carry out the purpose of the Legislature, to tax any excess the landlord gets, and the view of the Crown seems to me absolutely to defeat that intention. The Crown's method compares the revenue which the landlord gets in the accounting year at war prices with what he would have got in that year at peace prices, taking the basis selling price of the war year, and the result is that if the landlord at the beginning of the war, desirous not to profiteer, raises the basis selling price, and, therefore, decreases the royalty, the Crown punish him, for though he by that rise gets less the Crown will treat him as if he had also got less in the peace year and so make his apparent gain larger, and so the effect of his trying not to be a war profiteer is that the Crown take a larger tax from him. Again, if the selling price and the output should remain the same in the peace year and the war year, in spite of the landlord lowering the basis selling price at the beginning of the war, and so increasing his royalty with a view to profiteering, or if the rise in the selling price is less than the increase of royalty, the Crown's contention will not tax the landlord on his profiteering, for though he by his increase of royalty gets more the Crown will treat him as if he had also got more in the peace year, and so make his apparent gain less. If there is any ambiguity in the language, and

having to choose between the contention of the appellants which produces such a topsy-turvy result that you hit him if he does not profiteer and do not hit him if he does profiteer, and the contention of the respondents which does apparently make the tax have some slight relation to the landlord's merits or demerits in the matter of his royalty, I am led still further to the view that my original view was right, that the true construction of this clause is as contended for by the respondents. So much for the appeal.

The cross-appeal arises in this way. The referee has power under the Act to give expenses, and he has, as referees in my experience frequently have done, given nobody any expenses, and an attempt is made to appeal against that decision. It is a matter entirely within his discretion, and I can see no ground whatever for such an appeal. The cross-appeal, therefore, fails.

Appeal dismissed.

Solicitor for the appellants : *The Solicitor of Inland Revenue.*

Solicitors for the respondents : *Rawle, Johnstone & Co., for Howson & Dickenson, Whitehaven.*

W. I. C.

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1919

April 8, 9.

[IN THE COURT OF APPEAL.]

COMMISSIONERS OF INLAND REVENUE *v.* DUKE OF NORTHUMBERLAND.

Revenue—Excess Mineral Rights Duty—Method of Computation—Rent—Deduction of Income Tax—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 43, *sub-ss.* 1, 2.

By the Finance (No. 2) Act, 1915, s. 43, sub-s. 1, "Where the amount payable to any person as rent in respect of the right to work minerals . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid . . . . by reference to the amount of the rent paid in that working year, by that person . . . . an amount equal to fifty per cent. of that excess."

Sub-s. 2: "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year":—

Held, that in ascertaining the amount upon which excess mineral rights duty is to be paid under the section, it is permissible to deduct income tax from the amount payable as rent for the accounting year at the rate of tax paid in respect of that year; and also to deduct income tax from the amount which is to be taken to have been paid as rent in respect of the pre-war average year at the rate of tax in operation during the accounting year.

Decision of Sankey J. [1918] 2 K. B. 573 varied.

APPEAL by the Commissioners of Inland Revenue from a decision of Sankey J. (1) affirming a decision of a referee appointed under the Finance (1909–10) Act, 1910.

By a lease dated February 7, 1916, the late Duke of Northumberland granted to the Throckley Coal Co., Ltd., for the term of forty-two years and eight days from September 21, 1902, certain mines, seams, and beds of coal and fireclay under a large area of land therein described,

(1) [1918] 2 K. B. 573.

and certain surface lands, together with the rights of working and wayleave as therein mentioned. The rents reserved by the lease were of several kinds, and included (1.) a certain rent of 800*l.* a year, merging in the tonnage rents; (2.) tonnage rents for coal, varying according to selling price; (3.) outstroke shaft and wayleave rents on the basis of tonnage worked or carried; (4.) a certain rent of 160*l.* for the use of a wagon way; (5.) surface wayleave and staith rent on the basis of tonnage carried and distance traversed; (6.) tonnage rents for fireclay, varying according to selling price; (7.) a fixed tonnage rent for fireclay manufactured on the demised land. The two certain rents of 800*l.* and 160*l.* were made payable half-yearly. All the other rents reserved were made payable on September 29 in each year. By clause 82 of the lease it was agreed and declared that "all and singular the rents hereinbefore reserved shall be paid free and clear of and from all land tax and other taxes and all cesses, rates and charges, impositions and payments whatsoever, whether Parliamentary, local, or otherwise, and all other deductions whatsoever, except the landlord's property tax." And by clause 84 the lessees covenanted with the lessor that "the lessees will from time to time and at all times during the said term hereby granted pay the several rents, royalties, and annual payments herein and hereby reserved on the several days hereby appointed for the payment of the same respectively without any deduction or abatement whatsoever except as aforesaid."

The only rents material to the present case are (2.) and (6.), namely, those which varied with the selling price of coal and fireclay.

By the Finance (No. 2) Act, 1915, s. 43, sub-s. 1: "Where the amount payable to any person as rent in respect of the right to work minerals or of any mineral wayleaves . . . . varies according to the price of the minerals, and the amount so payable in respect of any working year ending on any date after the commencement of the present war (in this section referred to as the accounting year) exceeds the pre-war standard of that rent, there shall be paid as an addition to any mineral rights duty payable or paid, either directly or

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by deduction, by reference to the amount of the rent paid in that working year, by that person (in this section referred to as the person liable) an amount equal to fifty per cent. of that excess."

Sub-s. 2: "The pre-war standard of rent shall, for the purposes of this section, be taken to be the average of any two of the three last pre-war rent values, to be selected by the taxpayer. . . . .

"The pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year."

Sub-s. 3: "Any amount payable in any accounting year by the lessee of minerals or wayleaves to a superior lessor as rent in respect of the minerals or wayleaves shall be treated as a deduction from the amount payable to the lessee as rent for that year, and in computing the pre-war rent values a corresponding deduction shall be made on account of any such rent."

Sub-s. 4: "Any increment value duty payable annually under section twenty-two of the Finance (1909–10) Act, 1910, shall, when paid, be treated as a deduction from the rent payable to any person in the year in which the duty is paid, and a corresponding deduction shall be made in computing the pre-war standard with which the rent for that year is to be compared."

By the Finance (1909–10) Act, 1910, s. 20, sub-s. 1: "There shall be charged, levied, and paid for the financial year ending the thirty-first day of March, nineteen hundred and ten and every subsequent financial year on the rental value of all rights to work minerals and of all mineral wayleaves, a duty (in this Act referred to as a mineral rights duty) at the rate in each case of one shilling in every twenty shillings of that rental value."

For the accounting year ending September, 1916, the rent varying with the selling price payable to the Duke amounted

to 9718*l.* 13*s.* 1*d.*, and the pre-war standard of rent at the rate of royalty based on the average price of the minerals in two of the three pre-war years was 6990*l.* 4*s.* 4*d.*, the difference being 2728*l.* 8*s.* 9*d.*

The sums of 9718*l.* 13*s.* 1*d.* and 6990*l.* 4*s.* 4*d.* were made up in the manner appearing from the following table :—

A. Rent payable under Sliding Scale in the Accounting Year.				B. Pre-War Standard of Rent.			
Nature and description of the Minerals, Coals and Fireclay : Throckley and Blucher Areas.				Rate of Royalty, based on the average price of the minerals in two of the three preceding years.			
Coal :	£	*s.*	*d.*		£	*s.*	*d.*
Blucher Pit, 136,796.3 tons @ 8.1*d.* per ton.. ..	4616	17	6	Blucher Pit, 136,796.3 tons @ 5.7*d.* per ton ..	3248	18	3
Throckley Pit, 200,674.85 tons @ 5.85*d.* per ton ..	4891	9	0	Throckley Pit, 200,674.85 tons @ 4.29*d.* per ton ..	3587	1	3
Fireclay, 6730.55 tons @ 7.5*d.* per ton ..	210	6	7	Fireclay, 6730.55 tons @ 5.5*d.* per ton ..	154	4	4
	9718	13	1		6990	3	10

The question of principle for decision by the Court was whether (as the Commissioners contended) the excess mineral rights duty was imposed by s. 43, sub-s. 1, of the Finance (No. 2) Act, 1915, on the sum of 2728*l.* 8*s.* 9*d.*, or whether (as the respondent, the present Duke, contended) the actual income tax paid in respect of the accounting year (4*s.* in the pound), amounting to 1943*l.* 14*s.* 7*d.*, ought to be deducted from the 9718*l.* 13*s.* 1*d.*, leaving 7774*l.* 18*s.* 6*d.* as the net rent payable for that year, and the actual rate of income tax in operation for the pre-war year at 1*s.* 2*d.* in the pound, amounting to 407*l.* 15*s.*, ought to be deducted from the 6990*l.* 4*s.* 4*d.*, leaving 6582*l.* 9*s.* 4*d.* as the pre-war standard of rent, in which case the excess mineral rights duty would be imposed on 1192*l.* 9*s.* 2*d.*, the difference between the 7774*l.* 18*s.* 6*d.* and the 6582*l.* 9*s.* 4*d.* The referee decided that income tax in the respective years, according to the

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respective rates of tax then in operation, must be deducted. His decision (so far as material) was as follows :—

"My decision is that in all cases of income arising from royalties varying according to the current market prices of minerals, where in order to arrive at an excess profit figure the tonnage of the accounting year is applied to the prices of the pre-war average year, the actual income tax per pound paid in respect of the pre-war is the proper factor to be deducted from the amount so arrived at for the pre-war year, and that the actual income tax paid in respect of the accounting year is the proper factor to be applied to arrive at the figure of excess income for the said accounting year;

"That the amount upon which the excess mineral rights duty charged against the appellant is fixed must be arrived at after a deduction for income tax in the respective years according to the respective rates of tax then in operation, whether payable or not. . . . ."

On appeal by the Commissioners Sankey J. affirmed the decision of the referee.

The Commissioners appealed. The appeal was heard on April 8, 9, 1919.

Sir Gordon Hewart A.-G. and *Sheldon* for the appellants. The question of substance on this appeal is whether under s. 43 of the Finance (No. 2) Act, 1915, a deduction of income tax ought to be made from the rent in the accounting year on the one side and from the pre-war standard of rent on the other, and if so at what rate. The Commissioners submit that there should be no deduction of income tax at all. The object of the Act was to tax the excess of rent due to the war, and the question of income tax is a wholly separate matter. It is submitted that the words "the amount payable to any person as rent" in sub-s. 1 of s. 43, mean the rent reserved by the lease, and that the comparison is to be made between the rent in the accounting year and the pre-war standard of rent.

[SWINFEN EADY M.R. If you are right in your contention the subject would pay tax twice over.]

That would be the most adverse view that could be taken of the result. Income tax is payable on the rent reserved. Excess mineral rights duty is quite a separate thing, and is raised for a totally different purpose. No doubt the Act creates a hardship. The object of the section is to disentangle the excess of rent due to the war. The Commissioners therefore submit (1.) that the section disregards income tax altogether, and (2.) that if the effect is to impose a hardship on the taxpayer the income tax ought not to be deducted at different rates—that is, at one rate for the accounting year and at another rate for the selected year. They are willing that it should be deducted at the same rate for both years, namely, the rate for the accounting year.

It is submitted, however, that for the purposes of s. 43 no income tax ought to be deducted at all. The section does not provide that excess mineral rights duty is to be calculated on the net amount of the rent after deduction of income tax. It would have been easy for the Legislature to have so provided if it had been intended, but it has not done so. The section does in fact provide for certain deductions. See sub-ss. 3 and 4. There are obvious difficulties in deducting income tax from a notional figure. The object of the section is to tax the excess of yield due to the increase in price of minerals. Further there would be great difficulty, having regard to the variety of rents reserved by the lease, in applying the method contended for by the respondent. The section is deliberately framed to deal with rent reserved and not with rent actually paid.

[SWINFEN EADY M.R. A tenant has often to pay more income tax than he can deduct from the rent he pays.]

He is not assessed in respect of rent but of profits.

[SCRUTTON L.J. referred to s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34).]

That section limits the amount of deduction that can be made from that rent. The difficulty remains when you are dealing with a number of rents payable, as in this case, at different times, some of which are subject to mineral rights duty and others not.

Sankey J. has assumed that the words "amount payable

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as rent" in sub-s. 1 of s. 43 mean the same thing as the "amount paid as rent." In s. 20, sub-s. 2, of the Finance (1909–10) Act, 1910, the word used is "paid." The amount payable in any one year may not be the same as that which is actually paid: it may, for example, include arrears of rent. It is admitted that a payment by a tenant of income tax is a payment pro tanto of rent. Rent and arrears of rent are treated as the rent for the year in which they are paid: *Duke of Beaufort* v. *Inland Revenue Commissioners.* (1) It is admitted that for the purpose of excess mineral rights duty arrears of rent are not to be brought into account.

[WARRINGTON L.J. Sankey J. does not specifically deal with the rate at which income tax is to be deducted.]

The provisions of the Income Tax Acts cannot be made to apply to s. 43. Every accounting year ends on September 30: sub-s. 7 and s. 24 of the Finance (1909–10) Act, 1910. By the latter section the expression "working year" is defined to mean the year ending September 30 or such other day as may in any case be approved by the Commissioners, and may therefore cover two halves of two income tax years in which the rates of income tax may be different.

It is submitted, therefore, that income tax ought not to be deducted at all; but that if it is then it must be deducted at the same rate, namely, the rate in operation for the accounting year, from the rent in the accounting year and from the pre-war rent.

[They also referred to s. 60, Sched. (A), No. III., r. 3; No. IV., r. 9, of the Income Tax Act, 1842; and s. 15 of the Revenue (No. 1) Act, 1864.]

Disturnal K.C. and *Micklethwait* for the respondent. The learned judge was right in the construction he put upon s. 43. The question here is entirely one of the construction of the section, and it is therefore necessary to see what was the scheme and object of the duty. That cannot be stated better than it was by Viscount Haldane in *Murray* v. *Inland Revenue Commissioners.* (2) He there said: "The scheme of the

(1) [1913] 3 K. B. 48. (2) [1918] A. C. 541, 550.

excess minerals rights duty is this. A man pays on the difference between the total of what he receives in respect of royalties during the year of accounting and what he is taken by the Act to have received in respect of the pre-war standard year. But then by the introduction of the reference to pre-war value the matter is put upon an artificial basis. He pays, not upon the actual difference between the royalties in one period and the receipts in a later period, but he pays upon a quite different basis, ascertained by reference to a royalty varying with price, because it is only in the case of royalties varying with price that the section has any application. He pays, I say, upon the amount which he receives from these royalties in the year of accounting, minus so much as is arrived at by taking the same number of tons as had been raised in the year of accounting, and attributing to them a notional royalty corresponding to the figure which represents the pre-war average price." It might be that a man would have to pay more in income tax than the amount of the rent he in fact received.

[WARRINGTON L.J. That would be the case if the income tax exceeded 10*s.* in the pound.]

It is submitted that the section can be so read as not to impose an unreasonable burden on the taxpayer. In the form of this contract in the lease the lessees' covenant does not extend beyond the payment of the balance of the rent after deducting the income tax. The covenant is to pay the rent "without any deduction or abatement whatsoever except as aforesaid" (i.e., except landlord's property tax).

[SCRUTTON L.J. Is there any express clause in the lease as to deduction or abatement?]

Yes, clause 82 provides that the lessees are to pay the rents reserved free of all deductions "except the landlord's property tax."

The words of the section are the "amount payable"—not the "rent payable." The "amount payable" there means the amount of cash actually paid or legally payable by the lessees. The Legislature must have had this in mind. The point was in fact dealt with in the *Duke of Beaufort's Case* (1),

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which was a decision on the meaning of the word "paid" in s. 20 of the Finance (1909–10) Act, 1910. But every word of Buckley L.J.'s judgment in that case is as applicable to the meaning of the word "payable" as to that of the word "paid." The only contract here is to pay the balance of the rent after deduction of the tax. Apart from the express provisions of a statute a deduction of tax is to be deemed a payment pro tanto of rent and justifies a plea of payment. The *Duke of Beaufort's Case* (1) is binding on this Court unless a distinction is to be drawn between the meaning of the word "paid" in the Act of 1910 and the word "payable" in the Act of 1915, and it is submitted that there is no such distinction. The words "amount so payable" in sub-s. 1 of s. 43 mean what the landlord is entitled to receive. So far from the Act operating to work a hardship everything points the other way. The provisions in s. 22 of the Finance Act of 1910 as to increment value duty have no application to this case. That duty is chargeable on the landlord, and is not paid by the tenant, who has nothing whatever to do with it. All that s. 43 of the Act of 1915 does is to define a sum which is to form the basis of a comparison. It does not assist the matter, therefore, to go through the sections of the Act to see what deductions are permitted.

[SCRUTTON L.J. referred to *Hancock & Co.* v. *Gillard.* (2)]

That case does not touch the present. It was a decision on a different section under different circumstances.

It has been contended on behalf of the Commissioners that "amount payable" and "amount so paid" must refer to the gross rent and not the rent less income tax. But it cannot be said that the creation of the tax under s. 43 can affect the right of the tenant to make a deduction of income tax from the rent due to the landlord. It is true that there are here a number of rents which are to be calculated in various ways, but every one of them is ascertainable and the amount on which the lessees are taxed can be ascertained. It is a mere matter of arithmetic to calculate what amount of tax is attributable to each particular rent. The income tax is

(1) [1913] 3 K. B. 48. (2) [1907] 1 K. B. 47.

apportionable to every item of rent. If the respondent is right in his contention then what is paid by the tenant after deduction of tax is what is dealt with by s. 43. It may create some difficulty in bookkeeping but it does not affect the tenant's right of deduction.

The next question is whether income tax is to be deducted from the notional rent for the pre-war year. It is submitted that you cannot deduct income tax which has reference to a particular year from the notional rent for the pre-war year.

In the accounting year the tax to be deducted must be the income tax for that year. In the pre-war year the tax, if any, to be deducted should be at the rate of 1*s.* 2*d.* in the pound, the rate of tax then in operation. It is to the respondent's advantage that income tax should be deducted from the rent in the accounting year.

On behalf of the Crown it is contended that income tax is not deductible at all, but that if it is, it is ex gratia deductible at the same rate from both sides of the account. But that would still leave the great anomaly which the Legislature could not have intended, namely, that there might be an excess minerals duty payable in the accounting year where the landlord had received less than the amount of the duty. The section according to the respondent's interpretation of it only imposes a duty on the landlord to the extent to which he receives rent.

[They also referred to *Gowan* v. *Christie.* (1)]

There was no reply.

SWINFEN EADY M.R. This is an appeal from the judgment of Sankey J. with reference to a question of excess mineral rights duty. Two questions arise on the appeal. The first is whether in ascertaining the amount of excess which is liable to excess mineral rights duty under s. 43, sub-s. 1, on the amount payable to any person as rent, you are to take the net amount or the gross amount ; in other words, whether you are to take the amount actually payable as rent, that is to say, the sum after income tax has been deducted, or the

(1) (1873) L. R. 2 H. L. Sc. 273, 283.

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amount not actually payable, that is, the nominal amount of the rent? The second question arises on sub-s. 2 of the same section, and depends upon the true construction of the last clause of that sub-section, whether in ascertaining the pre-war rent value in the method pointed out by that sub-section, income tax is to be taken into account, and, if so, at what rate.

Now, s. 43 of the Finance (No. 2) Act, 1915, imposed an excess mineral rights duty, and that section is to be found in Part III. of the statute which contains a group of sections headed "Excess Profits Duty," and although this particular excess mineral rights duty is not strictly an excess profits duty, it is a duty of that character. The mineral rights duty was first imposed by the Finance (1909–10) Act, 1910. By s. 20, sub-s. 1, of that Act it was provided that there should be charged on the rental value of all rights to work minerals a mineral rights duty. The rental value was by sub-s. 2 defined and to be taken to be, where the right to work minerals is the subject of a mining lease, "the amount of rent paid by the working lessee in the last working year in respect of that right." A question arose in *Duke of Beaufort* v. *Inland Revenue Commissioners* (1) as to the meaning of the word "paid" in that sub-section. Did it mean the full amount of the rent before deducting tax, or did it mean the amount of rent actually paid? The case came before this Court, and it was determined that the word "paid" in that sub-section meant actually paid, and that the mineral rights duty was chargeable upon the amount of rent actually paid by the working lessee. Buckley L.J., who delivered the judgment of the Court (Cozens-Hardy M.R., Kennedy L.J., and himself), put it in this way (2): "It results that in my judgment the rent paid in this case is not the contractual rent, but the difference between the contractual rent or so much of it as the tenant affects to pay and the property tax which the tenant has deducted."

The statute of 1915, the statute here in question, imposed an excess mineral rights duty, and by s. 43 provides that the

(1) [1913] 3 K. B. 48. (2) [1913] 3 K. B. 48, 59.

duty so imposed shall be paid as an addition to any mineral rights duty payable or paid; and it would be curious if this additional or excess mineral rights duty was to be paid on the gross rental while the original duty was to be paid only in respect of the net rental. Moreover, the contention on behalf of the Inland Revenue Commissioners amounts to this, that according to the true construction of sub-s. 1 of s. 43 no income tax ought to be deducted before arriving at the amount of the excess, and that the Inland Revenue is entitled to receive from the landlord one moiety of the gross excess, that is to say, the excess on the gross basis. The result of that would be that the landlord would not receive the gross but the net sum; and would therefore not only have to pay the income tax upon his own moiety, or 50 per cent. of the excess, but he would also have to bear the income tax upon the other moiety that is payable to the Inland Revenue. True it is that by a later statute the proportion is increased from 50 per cent. to 60 per cent., but nothing turns upon that. If the contention put forward on behalf of the Crown is correct, it is not disputed that the result will be that the lessor would out of his 50 per cent. have to bear the income tax properly attributable to that moiety, and also that that moiety would be further reduced by his having to pay a sum equivalent to the income tax on the other moiety, as he would have to make up to the Inland Revenue one moiety of the gross amount of the excess. If that is the true construction of the section no doubt the Crown is entitled to judgment in its favour on that point. But is that the true construction of s. 43? It was decided in the case to which I have already referred that "paid" meant actually paid. In the present statute the word is "payable," but I fail to see any distinction in principle that can be drawn between the two expressions. If "paid" in the one case means "actually paid," why does not "payable" in the other case mean "actually payable"?

Further, there is this point which arises upon the facts of the present case. Under the lease of February, 1916, the provision for payment to the landlord is to be found in

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clauses 82 and 84. [His Lordship read the two clauses, and continued:] It is not therefore a case in which the lessees have covenanted to pay the full rent reserved by the lease leaving the deduction for income tax to be dealt with under the Income Tax Acts, under which they would have a right to deduct the payment made by them; but it is a case in which the only sum payable, according to the tenor of the instrument, is the net amount of the rent, and it is only that sum which, according to the true construction of the document, is ever paid. There is no covenant by the lessees to pay anything but the rent less tax. It is quite true that if the covenant had been to pay the gross sum, and not the net sum, the provisions of the Income Tax Acts would apply under which the lessees on paying income tax would be entitled to be "acquitted and discharged of so much money as such deduction shall amount unto, as if the amount thereof had actually been paid unto the person to whom such payment shall have been due and payable": s. 40 of the Income Tax Act, 1853. But the present case does not rest upon the statutory provision that the tenant is to be discharged as if the same had actually been paid. There is no question of discharge, because under the provisions of the lease the lessees never became liable to pay the amount.

The question, therefore, is: What is the construction to be placed on s. 43, sub-s. 1? [His Lordship read the sub-section, and continued:] In my opinion, applying the language of that sub-section to the present case, the only "amount payable to any person," that is to say, to the Duke, "as rent in respect of the right to work minerals," is the net sum, and that alone is the amount which is to be brought into the account in order to ascertain the amount that has to be divided into moieties, or into six-tenths and four-tenths, as the case may be, in order that the Inland Revenue may obtain its share.

The second point arises on the last clause of sub-s. 2 of s. 43, and is whether in determining the pre-war rent value on the notional basis, income tax, assuming it is to be deducted, is to be taken at the rate in force in the selected year or in the accounting year? The sub-section provides that "The

pre-war rent value shall, as respects each of the three years immediately preceding the first accounting year, be taken to be "—and this is the way in which it is arrived at—" the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." It is agreed that " in that year " means in the selected year. It will be observed that the notional sum to be arrived at is the sum to which the rent for the accounting year would have amounted on a certain hypothetical basis. That hypothesis is this : If the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in the selected year. What you are to do is to take the tonnage of the accounting year, and then see what would have been payable in that accounting year if the prices had been those of the pre-war year. But the only element in arriving at the figure that you are instructed to transfer from the pre-war year to the accounting year is the price—" if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." You have to introduce as the hypothesis into the accounting year, that the prices governing the payment of the rent are those of the pre-war year ; but that is all. If that is so what would have been the rent for the accounting year ? You have the tonnage of the accounting year ; you have the prices governing the payment of the rent introduced by the hypothesis ; and then there only remains the income tax ; and if you are arriving at the hypothetical rent for the accounting year, you must take the income tax for that year. In my judgment the decision of the referee and of the learned judge on this point was erroneous and should be reversed.

The result, therefore, is that the assessment ought to stand exactly as made by the Commissioners. The prayer of the Commissioners' petition of appeal is that the decision of the referee was erroneous, and that the true figure upon which excess mineral rights duty was payable for the year ending September 29, 1916, in respect of the said lease is really that set out in the assessment. The assessment stands.

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True it is that by the petition the Commissioners raised an additional point, the first point with which I have dealt, and although the assessment was based upon a different principle, when it came to be decided by the Court as to what was the true construction of the section the Commissioners by their petition have raised the issue that the excess mineral rights duty is charged under s. 43 upon the gross, and not upon the net amount, and that income tax ought not to be deducted. The result, therefore, is that we differ on one point from the learned judge below, a point which is impliedly, if not expressly, included in his judgment, and the ultimate result is that the original assessment stands.

WARRINGTON L.J. There are two questions before the Court in this case. The first is whether in ascertaining the amount payable to any person as rent in respect of the right to work minerals for the purposes of excess mineral rights duty dealt with by s. 43 of the Finance (No. 2) Act, 1915, the amount payable is to be the net amount of the rent reserved by the lease after deducting the income tax or the gross amount. The second question is, assuming that the amount payable is, on the true construction of the section, the net amount, after deducting income tax, is that income tax to be deducted at the rate current in what in the statute is called the accounting year, or at a different rate, in ascertaining the pre-war rent value?

With regard to the first point, the words of s. 43, sub-s. 1, are: [His Lordship read the sub-section, and continued:] This duty is declared to be an addition to the mineral rights duty imposed by s. 20 of the Finance (1909–10) Act, 1910. That duty is charged, levied, and paid on the rental value of all rights to work minerals, and the "rental value" is there declared to be in the appropriate case, "the amount of rent paid by the working lessee in the last working year." It has been already determined by this Court in *Duke of Beaufort* v. *Inland Revenue Commissioners* (1), that for the purposes of the mineral rights duty the "rent paid" is the

(1) [1913] 3 K. B. 48.

net amount of rent after deducting income tax; and it certainly would be a most extraordinary thing if in the case of an addition to that mineral rights duty the rent should be taken to be the gross amount, whereas with regard to the original mineral rights duty, to which it is an addition, it should be taken to be the net amount. But in truth there is no distinction in meaning material to this purpose between the word "paid" and the word "payable." It is quite obvious that the reason why in s. 43 of the Act of 1915 the word "payable" was used in preference to the word "paid," was in order to exclude all complications and difficulties which might have resulted from a default on the part of a lessee in paying the rent due from him in the actual working year. It seems to me, therefore, that the case is covered by the authority of the *Duke of Beaufort* v. *Inland Revenue Commissioners* (1), and that according to the true construction of s. 43 the amount payable as rent is the amount payable after the deduction of income tax. But independently of authority, I am bound to say that I should have come to the same conclusion on the construction of the statute alone, because in my judgment this statute is dealing with the amount which a man actually receives or is entitled to receive, and not with any technical question as to whether or not, having regard to the Income Tax Acts, the amount of income tax deducted from the rent is to be treated as a payment of rent to the lessor. I think it is quite obvious that in this taxing section what the Legislature is really dealing with are actual receipts by the person in question, or, where they are not actual receipts, moneys which as between himself and some other person, he ought to have received.

On this point there is the further consideration, applicable to this case alone, namely, that under the lease nothing became payable as between the lessor and the lessees except the rent after deduction of income tax. I need not read again the two clauses of the lease which have already been read by the Master of the Rolls. The effect of those two clauses when read together is that the only sum which the lessees covenant

(1) [1913] 3 K. B. 48.

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to pay is the rent after deducting the landlord's property tax.

With regard to the second point which arises on para. 2 of sub-s. 2 of s. 43, in arriving at the pre-war rent value the referee has taken the two limbs for the purposes of comparison, namely, the rent in the accounting year on the one side and the notional rent value on the other, and has deducted income tax from the rent of the accounting year at the rate then current, and has for the purposes of obtaining the notional rent value deducted the income tax at the rate current in the pre-war year. In making this last deduction he, in my opinion, adopted the wrong rate of tax. [His Lordship read para. 2 of sub-s. 2 of s. 43, and continued:] The words "that year" in the sub-section are by common consent, although the section is extremely awkwardly framed, to be taken to mean each of the three years immediately preceding the first accounting year, and not the accounting year itself. To hold that they referred to the latter would make the section absolute nonsense. What is it that is to be done? You have the actual figures for the accounting year, and the section tells you that in order to get the notional figure you have to see what would be the sum to which the rent for the accounting year would amount if it were based, not on the prices of the accounting year but on the prices governing the payment of rent in the pre-war year. That is all you have to do. You have to take the tonnage of the accounting year and the prices of the pre-war year and then see with that tonnage and those prices what the rent would amount to.

There remains only one other point upon this which it is necessary to mention. The word used by the draftsman, following the extraordinary tendency which draftsmen of Finance Acts have of using different words to mean the same thing, is "the rent," but I think the context quite clearly shows that by the expression "the rent" he means the same thing as "the amount payable as rent," which is the expression used in sub-s. 1 of the section, and I so read it—"to which the sum payable as rent for the accounting year

would amount if such sum, so far as variable according to price, were based on the average prices governing the payment of the rent in that year." The sum to which the rent for the accounting year would amount is arrived at after deducting income tax at the rate for the accounting year. It seems to me, therefore, that on both sides of this account, or on both limbs of this comparison, you must deduct the income tax, but in each case at the rate prevalent in the accounting year. The result is that the decision of the referee, which was affirmed in its entirety by Sankey J., is incorrect only so far as it applies a different rate of income tax to the two branches of the comparison. I think the prayer of the petition appears to put the matter quite correctly. It asks "That it may be declared that the decision of the referee was wrong and that the sum of 2182*l.* 15*s.* mentioned in the notice of assessment is, upon the true construction of s. 43 of the Finance (No. 2) Act, 1915, and in the circumstances of the case, the true figure upon which the excess mineral rights duty was payable for the year in question." That 2182*l.* 15*s.* is arrived at after deducting income tax at the same rate from each side of the account, and seems to be quite right.

SCRUTTON L.J. This case raises two points on the construction of s. 43 of the Finance (No. 2) Act, 1915, which imposed the excess mineral rights duty. I do not propose to repeat my general views on the construction of that section as I quite recently expressed them in *Inland Revenue Commissioners* v. *Trustees of Earl of Lonsdale's Settled Estates.* (1) The two points are these: the excess mineral rights duty by the section is 50 per cent. of the difference between two sums—(1.) the amount payable to any person as rent for minerals in a post-war year, and (2.) the sum to which the rent for that post-war year would amount if the prices instead of being war prices were prices in a pre-war year.

The first question raised is whether in taking those two sums, to get the difference you deduct income tax from both

(1) Ante, p. 183.

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of them. When the Commissioners assessed the Duke of Northumberland they deducted income tax, probably following the decision in the *Duke of Beaufort's Case* (1), to which I shall refer in a moment. But they argued before the learned judge in the court below, and they have argued before us, that income tax should not be deducted from either figure. If the matter were free from authority I should think there would be a very great deal to be said for that contention. The rent payable under a contract of tenancy is a fixed sum, say 100*l.*, payable by the tenant to the landlord; but the Income Tax Acts have adopted a system of taxing that sum at the source, and by various sections (see s. 60, Sched. (A), No. IV., r. 9, of the Income Tax Act, 1842, and s. 40 of the Income Tax Act, 1853), the person who is to receive the payment is not assessed; the person who is to make the payment is assessed, but is given a right to deduct the income tax he pays from the sum which he pays in pursuance of his contract to pay, and if having deducted the income tax the landlord should then sue him for the contractual sum his proper plea, as established by a series of cases, is payment; "I have paid you; I have paid you by making a deduction which I am entitled to make by the statute and which discharges a matter which otherwise the Crown might have come to you upon if the statute had been different." If I approached the matter free from authority I should have thought that the whole amount of the rent was payable to the landlord and was paid to the landlord, but that it was paid by discharging a matter which otherwise might have been obtained from the landlord if he had been assessed directly. But while that is the view I might have taken if the matter had been free from authority it appears to me that the decision in *Duke of Beaufort* v. *Inland Revenue Commissioners* (1) binds me and prevents me from taking that view. That case it is true was a decision on the mineral rights duty imposed under the Finance (1909–10) Act, which levied a duty of 1*s.* for every 20*s.* of the rental value, the rental value being defined by the Act to mean the amount of the rent paid by the working

(1) [1913] 3 K. B. 48.

lessee, and the question which there arose was, whether the amount of rent paid was the whole of the contractual sum or the contractual sum less the income tax deducted on the authority of the Income Tax Acts. And the Court of Appeal took the view, as expressed by Buckley L.J., that if there had been a direct right to receive the income tax from the landlord they would have held that the rent was paid to him, but that as there was no right under the Income Tax Acts to recover the income tax direct from the landlord, the words "rent paid" meant the sum the landlord actually received, and not something which he conventionally or notionally received by having income tax paid out of it direct to the Crown. That is the decision of the Court of Appeal, and it binds me, and if "rent paid" in the mineral rights duty section means only the actual sum received, I do not see my way to holding that "rent payable" means the sum contracted to be paid though not actually received because part of it is paid in income tax; and, therefore, feeling myself bound, whatever my view otherwise might have been, by the decision of the Court of Appeal in the *Duke of Beaufort's Case* (1), I think the original assessment of the Commissioners was right when they deducted the income tax, and that the point now taken that income tax should not be deducted from either side cannot in this court be entertained. That is the first point.

The second point is this: Assuming you are to deduct income tax on both sides, what income tax are you to deduct on each side respectively? You are to take first of all the rent paid in the accounting year. As to that there cannot be much doubt that the income tax you are to deduct is the income tax for that accounting year. The other thing you are to take is the sum to which the rent for the accounting year would have amounted if instead of the coal being sold at post-war prices it had been sold at pre-war prices. The Crown contend that you are still in the accounting year, and that you must, therefore, deduct the tax on the accounting year. The Duke of Northumberland on the other hand contends that if you are going to take the standard of the pre-war year you

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must take the income tax of that pre-war year. This, in my view, is not a case in which one has to consider what is just. One has simply to take the language that the Legislature has used. It is quite clear that for some purposes they have stuck to the accounting year. It is agreed that as a result of the decision in *Murray* v. *Inland Revenue Commissioners* (1) you are to take the output of the accounting year only: you do not take what the output was in the pre-war year you are dealing with although the result, as pointed out in the House of Lords, is that you may tax the landlord for excess mineral rights duty when he made less in the accounting year than he made in the pre-war year because the output was smaller in the accounting year, the post-war year, than it was in the pre-war year. One has to look simply at the language of s. 43, sub-s. 2, which is: "the sum to which the rent for the accounting year would amount if the rent, so far as variable according to price, were based on the average prices governing the payment of the rent in that (that is, the pre-war) year." It appears to me that the only thing you can bring in, and the only thing you are told to bring in, from the pre-war year, is the price governing the payment of the rent in that year. For everything else you remain in the accounting year, and it is agreed that you remain in it for output; you cannot go back to the actual output of the pre-war year because Parliament has not said you are to do so. The income tax appears to me to stand in exactly the same position. It seems to me that the respondent is trying to read the section in this way: "the sum to which the rent for the accounting year would amount if the rent were based on the average prices governing the payment of the rent in the pre-war year and the sum received were based upon the income tax of the pre-war year." If one were considering the matter afresh it might be right to make such a provision. All I can say is Parliament has not said it, and I have simply to interpret the words that Parliament has used in making this very hypothetical and artificial calculation; and on the words used I cannot see my way to saying that you are to import into the

(1) [1918] A. C. 541.

accounting year the income tax of the pre-war year. For these reasons I think the referee was wrong. I do not find myself that the learned judge has directly expressed any opinion upon this point. I suppose he must have considered it because he affirmed the decision of the referee, but he says nothing about it, and it is just possible that he did not actually appreciate that this point was being raised before him. If he did affirm the decision of the referee on this point, then I respectfully agree that he was wrong. I, therefore, concur in the judgment delivered by the other two members of the Court.

SWINFEN EADY M.R. The result is, we determine that income tax is to be deducted before arriving at the amount of the excess under sub-s. 1 of s. 1 of s. 43, and that in arriving at the pre-war rent value the rate of income tax to be deducted is the rate current for the accounting year, and not for the pre-war year. We decide both those points. The result is to restore the original assessment.

Appeal allowed.

Solicitor for the appellants : *The Solicitor of Inland Revenue.*
Solicitors for the respondents : *May, How & Chilver.*

W. I. C.

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CHRISTOPHER BARKER & SONS *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—"Profession, the profits of which are dependent mainly on personal qualifications"—Stockbrokers' Business—Divisibility—Buying and selling Stocks and Shares—Remuneration by Commission—Advising Clients—Valuation of Estates—Remuneration by Fee—Finance (No. 2) Act, 1915 (5 *&* 6 *Geo.* 5, *c.* 89), *s.* 39.

The appellants carried on the business of stockbrokers, buying and selling stocks and shares on the market for clients, being remunerated by commission. They were also consulted professionally on the promotion of and the alterations and adjustments of capital in commercial undertakings, and they also made valuation of stocks and shares forming part of the estates of deceased persons, being remunerated for such advice and valuations by fee:—

Held, that stockbrokers in buying stocks and shares do not carry on a profession within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and that the work of advice and valuation for which the appellants were remunerated by fees was done as part of and in connection with their business as stockbrokers and not in the exercise of a profession, and that therefore the appellants were liable to excess profits duty.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on January 24, 1918, at Sheffield, for the purpose of hearing appeals, the appellants, Christopher Barber & Sons, appealed against an assessment to excess profits duty in the net sum of 2544*l.* for the accounting period of one year ended December 31, 1916, made upon them by the Commissioners of Inland Revenue under the provisions of the Finance (No. 2) Act, 1915, Part III. and subsequent enactments.

The appellants were stock and share brokers carrying on business in Sheffield. They were members of the Sheffield Stock Exchange, which is one of the exchanges comprised in an association of all the principal provincial stock exchanges and which is bound by rules drawn up for the objects of such association. These objects are "to discuss and consider all questions of general business interest; to interchange views upon and devise methods for the convenient

execution and settlement of business; to assimilate the practice of the several exchanges, and generally to promote the interests of the exchanges and their members."

As members of the Sheffield Stock Exchange the appellants were bound by its rules generally in the conduct of their business, and in particular they were not allowed to advertise nor to issue circulars to persons other than their own principals; they had to give security to the extent of 1000*l.* and to pay an annual subscription; their remuneration was fixed by the laws of the exchange and they were liable in penalties and to expulsion for any infraction thereof. For the purposes of their business they required a special and intimate knowledge of companies carrying on trade, especially in the case of a number of local companies who did not publish balance sheets and of whose financial position information could only be acquired by personal experience in dealing with such companies; they required a similar knowledge of the various War Loans and Government securities; they had to be capable of advising persons desirous of investing moneys, and for that purpose had to be able to analyze balance sheets and had to have a critical knowledge of accounts generally in order to arrive at a due appreciation of the financial position of companies and corporations (both home and foreign) whose shares and securities were on the investment market; they had to treat all knowledge of their clients' investing and financial position as strictly confidential; they had to exercise skill and good judgment in buying and selling, and had to be quick and accurate in dealing with figures of a complex character. They were also consulted professionally on the promotion of, and the alteration and adjustment of capital in commercial undertakings, and they made valuations of stocks and shares forming part of the estates of deceased persons which were accepted as evidence by the Commissioners of Inland Revenue for the purpose of the Estate Duty Acts. Their remuneration for buying and selling stocks and shares was by commission on the amount involved, but for advice and valuations was by fee. They did not undertake speculative business. The amount of capital employed by the appellants (about 4000*l.*) in their business

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was less than a quarter per cent. of their turnover and their practice was carried on entirely by their personal efforts.

The appellants contended that they were not carrying on a business which was of a trading, mechanical or ordinary business character, but a profession in which they had become skilled by mental training; that the profits of their profession were dependent mainly on their personal qualifications, and that only capital expenditure of a comparatively small amount was required within the meaning of para. (*c*) of s. 39 of the Finance (No. 2) Act, 1915 (1), and that they were therefore excepted from excess profits duty.

The surveyor of taxes contended that the appellants carried on a business which was liable to excess profits duty.

The Commissioners who heard the appeal decided that the exception referred to did not apply, and confirmed the assessment.

Gore-Browne K.C. and *J. M. Gover K.C.* for the appellants. The appellants, who are stockbrokers, are not liable to pay excess profits duty, as they carry on a profession within the exception in para. (*c*) of s. 39 of the Finance (No. 2) Act, 1915. The term "profession" is applied to all occupations requiring intellectual skill: *Inland Revenue Commissioners* v. *Maxse*. (2) The necessity for mental skill constitutes the distinction between a profession and a trade, which is an occupation

(1) Finance (No. 2) Act, 1915, s. 39: "The trades and businesses to which this Part of this Act applies are all trades and businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

"(*a*) husbandry in the United Kingdom; and

"(*b*) offices or employments; and

"(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount,

but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

(2) [1919] 1 K. B. 647.

dealing substantially with the production and sale of commodities. Sankey J. held in *Inland Revenue Commissioners* v. *North and Ingram* (1) that a schoolmaster carried on a profession within para. (*c*). A stockbroker has to employ much mental skill, care and moral qualities in the conduct of his business, and the capital employed is often very small in comparison with the turnover.

[ROWLATT J. A stockbroker acts for an undisclosed principal and therefore is personally responsible on every contract he makes; his capital is accordingly more at risk than the capital of a lawyer or a doctor.]

The section after excepting three classes goes on to provide "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description." That clause and the first portion of the section ought to be read together and the exceptions in paras. (*a*) (*b*) and (*c*) ought to be taken as exceptions out of the whole section.

[ROWLATT J. That reading would give no meaning to the word "but."]

The word "but" is intended to show that the last clause of the section is not included in the three classes of exceptions. The meaning of the section is that prima facie all trades and businesses are to be treated as coming within the scope of the section with the exception of those coming within the three classes of exceptions (*a*) (*b*) and (*c*).

The appellants carry on two distinct branches of business which ought to be separately assessed as the Court of Appeal held must be done in *Inland Revenue Commissioners* v. *Maxse*. (2) Even if they must be treated as agents and therefore liable to be assessed in respect of the commission they receive for buying and selling stocks and shares, still the work which they do in advising clients and in making valuations is work which is essentially professional in character and for which they are remunerated by fee and not by commission and therefore is work which comes within the exception in para. (*c*)

Sir Ernest Pollock S.-G. and *T. H. Parr* for the respondents

(1) [1918] 2 K. B. 705. (2) [1919] 1 K. B. 647.

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were not required to argue the first point. The point as to the construction of s. 39 is not now open as the section has been construed by the Court of Appeal in *Burt & Co.* v. *Inland Revenue Commissioners* (1) in the opposite way to that contended for by the appellants here. The appellants do not carry on a profession when they give advice to clients and make valuations of the estates of deceased persons. The fact that they are paid by fees does not conclude the matter; the sums they receive are not really fees but agreed sums for business done. Formerly stockbrokers charged a percentage for this class of work. In *Burt & Co.* v. *Inland Revenue Commissioners* (1) Burt & Co. acted as secretaries of certain companies and dealt with the produce of those companies, they also acted as advisers of a Chinese company, and it was contended that they were carrying on a profession and therefore were not within the section; but the Court of Appeal held that the exercise of commercial knowledge by giving advice was not the exercise of a profession. It is necessary for every business man to use skill and ability in the conduct of his business, and therefore those qualities are not distinguishing marks of a profession. The term "profession" as used in the section is confined to the learned professions such as a lawyer, doctor, or architect. The appellants as stockbrokers do not come within the exception in para. (*c*) because they do not carry on a profession; their profits do not depend mainly on their personal qualifications and the capital employed by them in the business is not small in amount. A business does not cease to be a business merely because the person carrying on the business gives advice which he is qualified to give by reason of the fact that he carries on that business. The appellants give advice in the course of carrying on their business as stockbrokers and not by way of exercising a profession. Their business cannot in fact be divided into two portions as suggested. Whether or not the appellants are carrying on a profession is a question of fact which the Commissioners decided against the appellants.

Gore-Browne K.C. in reply. The term "profession" is not

(1) (1919) 35 Times L. R. 332.

limited to the learned professions. A stockbroker in giving advice is in the same position as a solicitor.

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ROWLATT J. In this case the question arises whether the appellants who are stockbrokers on the Sheffield Stock Exchange are liable to excess profits duty. The Commissioners have set out in the case the activities which the appellants pursue, and have then stated that the appellants contended that they were not carrying on a business but a profession, and that the surveyor of taxes contended the contrary, and that they decided in favour of the surveyor of taxes. That is the way in which the matter comes before me.

The appellants' business is a stockbrokers' business for the purchase and sale of stocks and shares for which they are paid commission on the amount involved and also an advising and valuing business for which they are paid by fee.

It was first contended by Mr. Gore-Browne on the construction of s. 39 of the Finance (No. 2) Act, 1915, that in spite of the fact that the appellants were remunerated in respect of probably the largest part of their business by commissions, they were not within this Act, because he read the last paragraph of the section not as an exception on the exception in para. (*c*) but as coming before the exception in para. (*c*), so that it was subject to that exception, saying that although the appellants take commissions yet inasmuch as they carry on a profession they are taken out of the persons liable to excess profits duty by reason of the fact that they carry on a profession. It seems to me however that that construction of the section cannot be correct because the words "but including" clearly introduce a limitation of the foregoing exception and you cannot turn the section round and say it means the same. But I find I am relieved from deciding that point because it has already been decided by the Court of Appeal in *Burt & Co.* v. *Inland Revenue Commissioners* (1) in the sense I have indicated.

Mr. Gore-Browne then says that the appellants' business is divisible and that as regards that part of the business in

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respect of which they do not take commissions but are remunerated by fees they are entitled to be absolved from this assessment upon the principle of divisibility of activities which has been lately laid down in the Court of Appeal in *Inland Revenue Commissioners* v. *Maxse.* (1)

Now assuming this divisibility in point of law whether or not the appellants' business is divisible depends upon whether the appellants are carrying on a profession the profits of which are dependent mainly on the personal qualification of the appellants, and in which no capital expenditure is required or only capital expenditure of a comparatively small amount. The scheme of the section has already been dealt with in several cases, and it is quite clear from those cases and from the language of the section itself that what is made liable to the excess profits duty is every business and what is taken out of liability is a profession. All professions are businesses, but all businesses are not professions, and it is only some businesses which are taken out of the operation of the section, namely, those which are professions, the profits of which are dependent mainly upon personal qualifications and in which no capital expenditure is required or only capital expenditure of a comparatively small amount. As I understand it that does not mean that every business where the profits depend on personal qualifications and not on capital, is therefore a profession within the meaning of para. (*c*) and accordingly not liable to this duty. I gather this para. (*c*) requires two elements to be satisfied; the business must be a profession and it must also be a profession of which the profits are mainly dependent on the personal qualifications of the person carrying it on and in which no capital expenditure is required or only capital expenditure of a comparatively small amount. No doubt the relation of personal qualifications to capital helps one to see whether or not the business which is being carried on is in any sense a profession, but the section does not say "any business the profits of which are dependent mainly" and so on; it says "any profession," etc. It may be that the profits of some businesses depend upon the personal qualifications

(1) [1919] 1 K. B. 647.

of the persons carrying them on rather than upon other matters. That is my construction of the section according to the decision of the Court of Appeal in *Burt's Case*. (1) At any rate it is the construction which I think the section bears. One has to ask whether the advising and valuing part of the appellants' business was the carrying on of a profession. It is true that so far as it is purely advisory it does depend upon the personal qualification of the appellants, and does not depend so much upon capital, but one has to see whether the Commissioners have gone wrong in law. It is probable that the appellants, being stockbrokers, attracted a certain amount of advising and valuing business for which they charged a fee. As regards the valuations this fee may have been merely a liquidated commission though not a percentage commission; the fee charged by the appellants for advising may have been a lump sum fee. But that work was probably all attracted by and ancillary to their business of stockbrokers.

Now is a stockbrokers' business a profession within the meaning of this section? It seems to me that what a stockbroker does is to buy and sell a com odity on the market. It is true he does not expect to have to pay for it himself or to be responsible ultimately to satisfy the contract himself, as he is a buyer and seller in the market for an undisclosed principal to whom he looks to indemnify him from liability. It does not seem to me that that is a profession within the meaning of this section. The stockbroker is remunerated by a commission which he receives from his principal, the person who takes the liability off his shoulders. In my opinion the advice given by a stockbroker comes within the dictum of Scrutton L.J. in *Burt & Co.* v. *Inland Revenue Commissioners* (1) because it is the exercise of commercial knowledge in connection with the sale of commodities in the market. Therefore it seems to me that although the appellants do a certain amount of advising for which they are remunerated by fees it is advice given in connection with the exercise of a business of a stockbroker and that in giving that advice they are not exercising any profession at all, even assuming that

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part of the business can be severed from the purely stock-broking part of their business of buying and selling stocks and shares for which they are remunerated by commission.

I very much doubt whether it would be possible for me even if I held a different view to decide otherwise. After all the Commissioners are judges of fact, and they have not disclosed to me what view of the law they took. All that appears on the case is that they decided that the exception did not apply; that the appellants did not carry on a profession and were therefore liable to excess profits duty. I cannot possibly say there is no evidence in support of that finding. But as the Commissioners have not disclosed to me upon what view of the law they proceeded, I very much doubt whether they have stated a case upon any point which is open to me. Treating the case however as not open to any such objection, I find that the decision of the Commissioners is correct and therefore I must dismiss the appeal.

Appeal dismissed.

Solicitors for appellants: *Ellis, Bickersteth & Co., for Lucas & Lucas, Sheffield.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

R. F. S.

CHAIRMAN, COUNCIL AND GOVERNORS OF BEDFORD COLLEGE *v.* GUEST (SURVEYOR OF TAXES).

1919
April 11.

Revenue—House Duty—College Buildings—Communication by covered Way —One Dwelling House—House Tax Act, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B, r.* 1.

The buildings of a college for the education of women provided accommodation for 597 persons of whom 126 were resident, the remainder living at their own homes. The college buildings consisted of two blocks used exclusively by the residents for living and sleeping in, and another block used by the residents for living and sleeping in, and also by the non-residents during the daytime, and four blocks, consisting of library, science buildings, lecture rooms and offices, which were used solely for educational purposes by both residents and non-residents, no one living, eating or sleeping in those blocks. These four blocks of buildings were not connected with the other blocks except by means of a substantial covered way one storey high, built of brick with a tiled roof, without any doors on either side, by means of which persons could pass from one block of buildings to another without going out of doors. This corridor was a convenience only, and its removal would in no way affect the use to which the several buildings were put. The college buildings were erected at the same time from the designs of the college architect:—

Held, that having regard to the manner in which the college buildings were constructed and the communication which existed between them, they must be regarded as one house within r. 1 of Sched. B to the House Tax Act, 1808, and therefore assessable to inhabited house duty accordingly.

Case stated by the Commissioners for executing the Acts relating to income tax and inhabited house duties for the parish and district of St. Marylebone.

The appellants appealed against the assessment to inhabited house duty made in respect of the college buildings in Regent's Park in the County of London for the year ending April 5, 1918, in the sum of 6500*l.* in the occupation of the appellants.

The appellants were a body incorporated in 1909 by royal charter under the name of "The Chairman, Council and Governors of Bedford College." The object of the college was (shortly) to provide a liberal education for women and to do all such things as were conducive thereto. A ground plan of the buildings and premises in Regent's Park was annexed to and made part of the case.

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The buildings and premises consisted of the lodge, in which the porter lived, and South Villa, the mansion house standing on the land when the appellants took their lease of the site from the Commissioners of His Majesty's Woods and Forests, and other portions marked Nos. 1 to 7 on the plan. No question arose as to the assessment of the lodge and South Villa and the portions 5, 6, 7, which it was agreed by the appellants were assessable to inhabited house duty.

The portions numbered 1 to 7 on the plan were as follows :—

1. The Sir Henry Tate library, consisting of one storey, marked 1 on the plan.

2. Science buildings, consisting of three storeys, marked 2 on the plan.

3. Lecture rooms and offices, consisting of three storeys, marked 3 on the plan.

4. Science buildings, consisting of three storeys, marked 4 on the plan.

5. The part marked 5 on the plan containing the dining-hall, kitchen, and common rooms, etc., with accommodation on the first floor over the kitchen for the servants' sleeping quarters, over the common rooms the principal's flat, and on the second floor over the principal's flat residential rooms for a certain number of students.

6. A residential part, marked 6 on the plan.

7. Another residential part, marked 7 on the plan.

The several parts of the college buildings and premises marked 1 to 7 on the plan were erected at one and the same time from the designs of the college architect. The college buildings provided accommodation for 597 persons, of whom 126 students and staff were resident, living, eating, and sleeping upon the college premises. The resident staff and students resided in portions 5, 6 and 7, and in South Villa. The non-resident students and staff lived and slept at their own homes, though many of them used the college dining hall in part 5. The whole of the residential accommodation was contained in parts 5, 6 and 7 on the plan, and in South Villa, no one—either caretaker or other person—living, eating, or sleeping in parts 1, 2, 3 or 4. Only the resident students and staff had

the right to use the portion marked 6 and 7 upon the plan. The portion marked 5 was used by the residents for living, eating, and sleeping, and by non-residents during the day-time. The portions marked 1, 2, 3 and 4 were used for educational purposes solely, by both residents and non-residents. The portions marked 1, 2, 3 and 4 were not connected with the other portions 5, 6 and 7 save by means of a substantial covered way or corridor one storey high, and without any doors on either side, made of brick with a tiled roof and having windows at the sides, which enabled the residents in parts 5, 6 and 7 to obtain access to the educational portions 1, 2, 3 and 4, and enabled the non-resident students and staff to obtain access to the dining and common rooms without going into the open air. This way or corridor was a convenience only, and its removal would in no way affect the use to which the several portions were put. The boiler house, which was in portion 3, supplied the whole premises with hot water, and all gas and water pipes and electric cables were continuous throughout the whole premises.

The college premises were assessed to the parochial rates as a whole at the gross rateable value of 6500*l.* and 5417*l.* net rateable value.

The appellants contended that on the true construction of r. 2, Sched. B of the House Tax Act, 1808 (1), the portions 1, 2, 3 and 4 on the plan were not assessable to inhabited house duty as offices belonging to and occupied with the residential parts, and they contended that the assessment should be amended by the deduction therefrom of such portion of the said assessment as might be attributable to the value of the portions marked 1, 2, 3 and 4 upon the plan, together with a

(1) Rule 1 of Sched. B. of the House Tax Act, 1808: "The said last mentioned duties to be charged annually on the occupier or occupiers for the time being of every such dwelling house, being of the annual rent of [twenty] pounds or upwards at the respective rates before mentioned. . . . ."

Rule 2: "Every coachhouse, stable, brewhouse, washhouse, laundry, woodhouse, bakehouse, dairy, and all other offices, and all yards, courts and curtilages, and gardens, and pleasure grounds, belonging to and occupied with any dwelling-house, shall, in charging the said duties, be valued together with such dwelling-house. . . . ."

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due proportion of the value of the land occupied and used with all the college buildings. They submitted that the gross rateable value of the lodge, South Villa, and of parts marked 5, 6 and 7 on the plan together with a due proportion of the land occupied and used with all the college buildings should be the sum of 3150*l.*, and that the gross rateable value of parts marked 1, 2, 3 and 4 on the plan together with a due proportion of the said land would, if the same were assessable—which they did not admit—be the sum of 3350*l.* The appellants relied on the decision of the House of Lords in *Governing Body of Westminster School* v. *Reith.* (1)

The respondent contended (inter alia) that having regard to the circumstances that all the premises in question stood within one curtilage and were in one occupation, and to the connection that existed between the several portions as above stated, the whole of such premises constituted one house and were properly assessable to inhabited house duty in one sum.

The Commissioners were of opinion that on the above facts and seeing how the college buildings were constructed as above described they were bound in law to regard them as one house and assessable to inhabited house duty accordingly, and they therefore dismissed the appeal.

Macmorran K.C. and *Naldrett* for the appellants. The assessment of the whole of the buildings in the occupation of the appellants as Bedford College to inhabited house duty was wrong. The college is really divided into two portions, namely, the four blocks of building forming the educational part of the college and the three blocks of buildings forming the residential part of the college. The educational portion of the buildings cannot be said to be offices occupied with the residential portion of the buildings within r. 2 of Sched. B of the House Tax Act, 1808. In reality the residential portion of the college is occupied with the educational portion, only 126 persons residing in the college whereas 597 persons use the educational portion of the college. The fact that the educational part of the college buildings are connected with the

(1) [1915] A. C. 259.

residential part of the buildings by a covered way is not sufficient to make them one dwelling house. It is one institution with a number of different buildings, but it is not one dwelling house. The House of Lords held in *Governing Body of Westminster School* v. *Reith* (1) that the schoolroom, classrooms, library, which were used by all the boys, 270 in all, attending the school, were not offices belonging to and occupied with the college in which 40 foundation scholars resided and therefore were not liable to be assessed to inhabited house duty. The present case is identical with that case except that there the buildings were structurally disconnected, whereas in the present case the buildings are connected by the covered way, but that is merely a convenience and can be removed or blocked up, without affecting the use to which the various buildings are put. In *Browne* v. *Furtado* (2) there was communication between the residence and the disputed buildings by means of a door in the dividing wall and a passage which was roofed in. The Court of Appeal however did not decide the case in favour of the Crown on that ground, but because the disputed buildings were necessary for the carrying on of the business of a school and were built and used for the residents in the dwelling house and for no one else. That case was distinguished in *Governing Body of Westminster School* v. *Reith*. (1)

Sir Ernest Pollock S.-G. and *T. H. Parr* for the respondents. This case comes under r. 1 of Sched. B of the House Tax Act, 1808, as one dwelling house. These buildings are not offices within r. 2. The buildings of the college being structurally connected by the covered way form one dwelling house. Earl Loreburn said in *Governing Body of Westminster School* v. *Reith* (3) that "if it could be shown that the buildings in question were really part of an inhabited house, whether by reason of structural connection or in some other way, then they might possibly be assessable." In that case the buildings were not structurally connected and therefore that decision does not govern the present case. In *London and Westminster Bank* v. *Smith* (4) there was communication between the ground floor

(1) [1915] A. C. 259.
(2) [1903] 1 K. B. 723.
(3) [1915] A. C. 264.
(4) (1902) 87 L. T. 244.

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which was used as a bank and the upper floor which was used as a residence by the bank manager by a door leading on to a staircase, and the House of Lords held that the whole building was therefore assessable. In *Knight* v. *Manley* (1) a dwelling-house and solicitor's offices formed one block of buildings and were connected by two doorways on the ground floor in the dividing wall, and it was held that inhabited house duty was therefore chargeable on the whole block of buildings.

Macmorran K.C. replied.

ROWLATT J. In this case the appellants, who are the Governing Body of Bedford College, seek to have their assessment to inhabited house duty in respect of Bedford College reduced by the elimination of four blocks of buildings which they say do not form part of a dwelling house and therefore are not liable to be assessed. No question arises here, in my judgment, as to whether or not these parts of the premises are offices belonging to and occupied with a dwelling house within the meaning of r. 2 of Sched. B. of the House Tax Act, 1808. I should have thought that they were not. I think that the decision in *Governing Body of Westminster School* v. *Reith* (2) shows that they would not be. But the Crown do not contend that they come under that rule, so that question does not arise. The question here is whether these buildings form one dwelling house. I think that is just the same as saying that the question is whether these buildings form one house, because if it is all one house, it is certainly dwelt in and therefore the whole of it is a dwelling house.

In *Browne* v. *Furtado* (3) there were two houses adjoining which were used for the purposes of a boarding school between which a communication existed by a door in the dividing wall, and although the case was decided in favour of the Crown and against the subject, the Court of Appeal inclined to the view—they did not decide it—that notwithstanding the communication the whole of the premises did not constitute structurally one house. On the other hand in *Knight* v. *Manley* (1) a

(1) (1905) 5 Tax Cas. 82. (2) [1915] A. C. 259.
(3) [1903] 1 K. B. 723.

house and offices had been practically turned into one building not merely by a hole in the dividing wall but by borrowing an essential part of the private house and incorporating it as far as its use was concerned with the offices, and it was held that the inhabited house and the offices formed one house. In *London and Westminster Bank* v. *Smith* (1) the premises were held to be one house, but that was really quite a different case because it was one house in the sense of one tall building with separate floors, only instead of having continuous access from the staircase on each landing to the rooms on that landing there was an outside door on each landing turning the rooms on that landing into a flat, but the building was in fact one house. The question which arose in that case, namely, whether the house was divided into and let in separate tenements used solely for a trade or business was a subordinate one, and only arose after the conclusion had been arrived at that it was one house.

In the present case the premises of Bedford College are of rather a peculiar character, but in my view they have been designed as and are one house. It is true that they can easily be separated, but the design of the architect was that all these blocks of buildings should not only adjoin but also communicate so that persons can pass from one end of the college buildings to the other without going out of doors. Having regard to that fact I do not think I can possibly say that the various buildings are not one house. Nearly 130 persons reside in part of it. These people live in a house which includes not only buildings used for the purpose of a dwelling house but also buildings used for educational purposes, and which are able to accommodate a great many persons who do not live there but merely come there in the daytime and study. The appellants might have had, and probably very shortly will have, two houses, but that will not be so convenient. It may however be worth while to endure the inconvenience rather than pay the duty. A very little alteration to the buildings may make all the difference to the legal aspect of the case. But at present it seems to me that this is simply one house intended and built as one. It would lack one of its greatest

(1) 87 L. T. 244.

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features it it had not been one. It is in my opinion one house, and as it is dwelt in it is therefore a dwelling house, and hard as the case is the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants : *Shaen, Roscoe, Massey & Co.*
Solicitor for respondent : *Solicitor of Inland Revenue.*

R. F. S.

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March 7; April 14.

GOLDING *v.* BRADLAW.

[1918 G. 1049.]

Gaming—Cheques given in Payment of Racing Bets—Cheques indorsed by Payee to Third Person—Knowledge of Indorsee as to Origin of Cheques—Payment of Indorsee by Drawer—Claim by Drawer against Payee to recover back Amount of Cheques—Gaming Act, 1835 (5 *&* 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

Sect. 1 of the Gaming Act, 1835, provides that certain securities which by previous statutes would have been absolutely void shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration.

Sect. 2 : "In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is [by certain statutes] declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law. . . . ."

The plaintiff gave the defendant three cheques in payment of certain racing bets. The cheques were made payable to the defendant or order, and were indorsed by the defendant to a Mr. Lee, who gave him cash for them. Lee knew when the cheques were indorsed to him that they had been given by the plaintiff to the defendant in payment of bets. The cheques were presented by Lee to the plaintiffs' bankers and duly honoured. The plaintiff subsequently sought to recover back the amount of the cheques from the defendant under s. 2 of the Gaming Act, 1835. The defendant alleged that the plaintiff could not rely upon that section, as Lee was not an indorsee for valuable consideration without notice :—

Held, that the remedy given by s. 2 of the Act was not confined to a case where payment had been made to an indorsee for valuable consideration without notice, but applied where payment had been made to any indorsee, and the plaintiff was therefore entitled to recover.

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ACTION tried as a short cause before Bray J.

The plaintiff, who was a bookmaker, in July, 1918, gave to the defendant, who was a dentist, three cheques for 1*l.* 18*s.* 4*d.*, 35*l.* 1*s.* 4*d.*, and 1*l.* respectively drawn by the plaintiff in favour of the defendant or order in payment of certain bets on horse-races. These cheques were indorsed by the defendant to his partner, a Mr. Lee, who gave the defendant cash for them. They were presented by Lee to the plaintiff's bankers and were duly honoured. Lee knew when the cheques were indorsed to him by the defendant that they had been given by the plaintiff to the defendant in payment of bets.

The plaintiff claimed to recover from the defendant the amount of the three cheques—namely, 37*l.* 19*s.* 8*d.*—alleging that by virtue of the Gaming Act, 1835 (1), the cheques must be deemed to have been given for an illegal consideration, and that he was therefore entitled to recover the amount of the cheques under s. 2 of that Act.

Cannot for the plaintiff. As the cheques were given in

(1) Gaming Act, 1835, s. 1, after reciting (inter alia) the statutes of 9 & 11 Anne, which provided that "all notes, bills, ... or other securities, ... given . . . . or executed by any person . . . . where the whole or any part of the consideration of such conveyances or securities should be for any money or other valuable thing whatsoever won by gaming or playing at cards, ... or other game or games whatsoever, or by betting on the sides or hands of such as did game at any of the games aforesaid, ... should be utterly void" enacted that "so much of the hereinbefore recited Acts . . . . as enacts that any note, bill, or mortgage shall be absolutely void, shall be, and the same is hereby repealed; but nevertheless every note, bill, or mortgage which if this Act had not been passed would, by virtue of the [recited Acts] have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given, or executed for an illegal consideration. . . . ."

Sect. 2: "In case any person shall . . . . make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is by the hereinbefore recited Acts . . . . declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill, or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law in any of His Majesty's courts of record."

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respect of betting transactions they are by virtue of the Gaming Act, 1835, deemed to have been given for an illegal consideration, and s. 2 of that Act enables the drawer of the cheques who has actually paid the indorsees of the cheque to recover the amount of the cheques from the person to whom they were originally given: *Lynn* v. *Bell* (1); *Gilpin* v. *Clutterbuck* (2); *Nicholls* v. *Evans*. (3)

Schultess Young for the defendant. The Gaming Act, 1835, was only intended for the protection of an indorsee for valuable consideration without notice, and as Lee knew when the cheques were indorsed to him that they had been given in payment of bets, and therefore for an illegal consideration, he was not entitled to enforce payment of them against the plaintiff: *Hyams* v. *Stuart King* (4); *Saxby* v. *Fulton*. (5) As the plaintiff therefore was not bound to pay Lee he cannot claim the benefit of s. 2 of the statute and recover the amount of the cheques so paid from the defendant.

Cannot in reply. It is sufficient to entitle a drawer of a cheque to recover under s. 2 of the Gaming Act that the cheque has been paid to an indorsee. There is nothing in the section which makes it necessary that the indorsee should be a bona fide indorsee for value. The drawer of a cheque would not know whether or not the indorsee was a bona fide indorsee for value. The statute does not impose upon the drawer the obligation of waiting until he is sued by the indorsee before paying the cheque. This point was decided by Shearman J. in *Fogg* v. *Fairbrother* (6) in favour of the present plaintiff's contention.

Cur. adv. vult.

April 14. BRAY J. The plaintiff, who was a bookmaker, sought to recover from the defendant under s. 2 of the Gaming Act, 1835, the amount of three cheques which he had paid to the indorsee of the cheques, a Mr. Lee. The cheques had been given by the plaintiff to the defendant in payment of certain bets. The evidence given before me was to the effect

(1) (1876) Ir. R. 10 C. L. 487.
(2) (1849) 13 L. T. Newsp. 71.
(3) [1914] 1 K. B. 118.
(4) [1908] 2 K. B. 696, 714.
(5) [1909] 2 K. B. 208, 229.
(6) June 7, 1918, unreported.

that the cheques had been cashed by Lee, to whom they had been indorsed by the defendant, and that Lee was eventually paid by the plaintiff. Evidence was also given that Lee had notice before he cashed the cheques that they had been given by the plaintiff to the defendant in payment of bets. It was not suggested that the plaintiff knew that Lee had notice. The defendant took the point that he was not liable in this action because Lee was not an indorsee for valuable consideration without notice, and that the Act was only intended to protect such indorsees. It was suggested during the argument that this point had been decided by Shearman J. in *Fogg* v. *Farebrother*. (1) I thereupon reserved judgment, because I thought that if it had been so decided I ought to follow that decision. I have been supplied with a note of the judgment of Shearman J., and I have seen that learned judge. It is clear that the point was not present to the mind of that judge when he decided that case. And therefore I must decide the point as to the construction of the section myself.

The section seems to me to be plain and unambiguous. [His Lordship read the section, and continued :] The material words are, "and such person shall actually pay to any indorsee of such note or bill the amount of the money thereby secured." The plaintiff did actually pay to Lee the amount of the money secured by the three cheques. It is however said that I ought to look at the whole of the Act, and that when that is done it is plain that the Act was really only intended for the protection of an indorsee for valuable consideration without notice. It is true that s. 1 of the Act provides that only an indorsee for valuable consideration without notice can enforce payment of a bill or note given in payment of bets, but s. 2 does not deal with indorsees ; it deals with the person who originally gave the note and the person who received payment. The object of that was this : the person who lost the bet was not to be affected or to be injured by s. 1, and therefore it was provided that in case the loser of the bet should have to pay to an indorsee the amount of a bill given to the winner of the bet in payment of the bet

(1) June, 7, 1918, unreported.

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he should have a remedy over against the winner of the bet, if in fact the cheque had been paid by the loser. It may well be that the Legislature did not intend to make it a condition to such an action that the person to whom the amount was actually paid should be an indorsee for valuable consideration without notice, and for this reason, the loser of the bet would be in a very difficult position; he could not know whether or not the indorsee had notice of the origin of the cheque or whether he would have a good defence if he were sued. The cheque in the ordinary course would be paid by his bankers. I can only ascertain the intention of the Legislature from the words used. When the words of the Act are looked at it seems to me that it must have been the intention of the Legislature that the remedy given by the Act should apply where payment had been made to any indorsee. Those are the words used, "any indorsee." The point, therefore, that has been raised by the defendant fails, and the plaintiff is entitled to judgment for the amount of the three cheques.

Judgment for plaintiff.

Solicitors for plaintiff: *Robert Greening & Co.*
Solicitor for defendant: *W. P. Davies.*

R. F. S.

PHILLIPS *v.* BROOKS, LIMITED.

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April 11; *May* 1.

[1918 P. 674]

Sale of Goods—Passing of Property—Purchaser fraudulently personating another Person.

If A., fraudulently assuming the name of a person of credit and stability, buys, in person, and obtains delivery of, goods from B., the property in the goods passes to A., and he can therefore give a good title thereto to a third party who, acting bona fide and without notice, has given value therefor, unless in the meantime B. has taken steps to disaffirm the contract with A.

Edmunds v. *Merchants' Despatch Transportation Co.* (1883) 135 Mass. 283 followed.

ACTION tried by Horridge J.

The plaintiff, who was a jeweller, sued the defendants, who were pawnbrokers, for the return of a ring or, alternatively, its value, and damages for its detention.

On April 15, 1918, a man entered the plaintiff's shop and asked to see some pearls and some rings. He selected pearls at the price of 2550*l.* and a ring at the price of 450*l.* He produced a cheque book and wrote out a cheque for 3000*l.* In signing it, he said: "You see who I am, I am Sir George Bullough," and he gave an address in St. James's Square. The plaintiff knew that there was such a person as Sir George Bullough, and finding on reference to a directory that Sir George lived at the address mentioned, he said, "Would you like to take the articles with you?" to which the man replied: "You had better have the cheque cleared first, but I should like to take the ring as it is my wife's birthday to-morrow," whereupon the plaintiff let him have the ring. The cheque was dishonoured, the person who gave it being in fact a fraudulent person named North who was subsequently convicted of obtaining the ring by false pretences. In the meantime, namely on April 16, 1918, North, in the name of Firth, had pledged the ring with the defendants who, bona fide and without notice, advanced 350*l.* upon it.

In his evidence the plaintiff said that when he handed over

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the ring he thought he was contracting with Sir George Bullough, and that if he had known who the man really was he would not have let him have it. In re-examination he said that he had no intention of making a contract with any other person than Sir George Bullough.

Hogg K.C. and *Roome* for the plaintiff. The property in the ring never passed out of the plaintiff. There was no contract between the plaintiff and North. Where the owner of goods voluntarily parts with the possession of them but does not intend to pass the property in them to the particular person with whom he is dealing, being deceived by him as regards his identity, larceny by a trick is committed by the fraudulent person and there is no contract. See *per* Buckley L.J. in *Whitehorn* v. *Davison*. (1) That was the case in *Cundy* v. *Lindsay* (2), where a person obtained goods by writing a letter fraudulently inducing the belief in the minds of the owners of the goods that he was a reputable firm bearing a very similar name to his own. So, too, in *Hardman* v. *Booth* (3), where a person obtained goods by a false representation that he was a member of a particular firm. See also *In re International Society of Auctioneers and Valuers; Baillie's Case*. (4) In this case the plaintiff intended to contract with Sir George Bullough and with no one else, and he purported to make a contract with Sir George Bullough. The whole transaction was a nullity, and North, who could have been convicted of larceny by a trick, could pass no title to the defendants, who are therefore liable to the plaintiff. [They referred to ss. 1, 32, and 45 of the Larceny Act, 1916.]

J. B. Matthews K.C. and *Valetta* for the defendants. The property in the ring passed from the plaintiff to North: *Edmunds* v. *Merchants' Despatch Transportation Co.* (5), which decided that if A., in person, obtains goods by pretending to be B., then, as A. is identified by sight and hearing, the property passes. The present case is quite different from *Hardman* v. *Booth* (3), where the owner of the goods was induced by

(1) [1911] 1 K. B. 463, 479.
(2) (1878) 3 App. Cas. 459.
(3) (1863) 1 H. & C. 803.
(4) [1898] 1 Ch. 110.
(5) (1883) 135 Mass. 283.

the fraudulent person to believe that he was contracting with a certain firm, and not with the swindler personally. There the swindler purported to act as the agent of the firm. So, too, in *Cundy* v. *Lindsay* (1), where there was a written order, fraudulently concocted, which induced in the minds of the goods owner the belief that it came from a reputable firm, whereas in truth it emanated from an impostor bearing a somewhat similar name. In this case the contract was made between the plaintiff and the man North, who was present before the plaintiff in flesh and blood. North could not have been convicted of larceny by a trick. The distinction is clear between that offence and the offence of obtaining goods by false pretences. In the former the owner of goods has no intention to part with the property, whereas in the latter he has the intention to part with it. See *Rex* v. *Jackson* (2); *Reg.* v. *Adams* (3); *Reg.* v. *Hazelton* (4); *Reg.* v. *Martin*. (5)

Hogg K.C. in reply.

[HORRIDGE J. *Edmunds* v. *Merchants' Despatch Transportation Co.* (6) appears to be against you.]

That case is cited by Sir Frederick Pollock in his book on Contracts, 8th ed., p. 497*n.*, but after it he adds "Sed qu. and cf. Pothier, Obl. § 19." I adopt the query, and rely on Pothier's opinion, which is set out in the judgment of Fry J. in *Smith* v. *Wheatcroft*. (7) Pothier says: "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract." In this case it was a material element of the contract into which the plaintiff was willing to enter that the purchaser of the ring was to be Sir George Bullough.

[*Reg.* v. *Middleton* (8), *Reg.* v. *Buckmaster* (9), Factors Act, 1889, s. 9, and Sale of Goods Act, 1893, s. 24, sub-s. 2, were also referred to.] *Cur. adv. vult.*

(1) 3 App. Cas. 459.
(2) (1813) 3 Camp. 370.
(3) (1844) 1 Den. C. C. 38.
(4) (1874) L. R. 2 C. C. 134.
(5) (1879) 5 Q. B. D. 34.
(6) 135 Mass. 283.
(7) (1878) 9 Ch. D. 223, 230.
(8) (1873) L. R. 2 C. C. 38.
(9) (1887) 20 Q. B. D. 182.

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May 1. HORRIDGE J. read the following judgment: This is an action brought by the plaintiff, who is a jeweller in Oxford Street, London, for the return of a ring or its value, and for damages for detaining the same. The value of the ring was agreed as being 450*l.*, and no evidence was given before me of any damage, apart from the value of the ring which was taken. I have carefully considered the evidence of the plaintiff, and have come to the conclusion that, although he believed the person to whom he was handing the ring was Sir George Bullough, he in fact contracted to sell and deliver it to the person who came into his shop, and who was not Sir George Bullough, but a man of the name of North, who obtained the sale and delivery by means of the false pretence that he was Sir George Bullough. It is quite true the plaintiff in re-examination said he had no intention of making any contract with any other person than Sir George Bullough; but I think I have myself to decide what is the proper inference to draw where a verbal contract is made and an article delivered to an individual describing himself as somebody else.

After obtaining the ring the man North pledged it in the name of Firth with the defendants, who bona fide and without notice advanced 350*l.* upon it. The question, therefore, in this case is whether or not the property had so passed to the swindler as to entitle him to give a good title to any person who gave value and acted bona fide without notice. This question seems to have been decided in an American case of *Edmunds* v. *Merchants' Despatch Transportation Co.* (1) The headnote in that case contains two propositions, which I think adequately express my view of the law. They are as follows: (1.) "If A., fraudulently assuming the name of a reputable merchant in a certain town, buys, in person, goods of another, the property in the goods passes to A." (2.) "If A., representing himself to be a brother of a reputable merchant in a certain town, buying for him, buys, in person, goods of another, the property in the goods does not pass to A."

The following expressions used in the judgment of Morton C.J. seem to me to fit the facts in this case: "The

(1) 135 Mass. 283, 284.

minds of the parties met and agreed upon all the terms of the sale, the thing sold, the price and time of payment, the person selling and the person buying. The fact that the seller was induced to sell by fraud of the buyer made the sale voidable, but not void. He could not have supposed that he was selling to any other person; his intention was to sell to the person present, and identified by sight and hearing; it does not defeat the sale because the buyer assumed a false name or practised any other deceit to induce the vendor to sell." Further on, Morton C.J. says: "In the cases before us, there was a de facto contract, purporting, and by which the plaintiffs intended, to pass the property and possession of the goods to the person buying them; and we are of opinion that the property did pass to the swindler who bought the goods."

The rule laid down by Lord Cairns L.C. in *Cundy* v. *Lindsay* (1) is as follows: "If it turns out that the chattel has been stolen by the person who has professed to sell it, the purchaser will not obtain a title. If it turns out that the chattel has come into the hands of the person who professed to sell it, by a de facto contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, there the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract which would enable the original owner of the goods to reduce it, and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced."

The question whether or not the property would pass if a fraudulent person had gone himself to the firm from whom he wished to obtain the goods and had represented that he was someone else was raised in the argument in *Cundy* v. *Lindsay*. (2) In the speech of Lord Penzance, he says (3):

(1) 3 App. Cas. 459, 464.

(2) 3 App. Cas. 459, 462.

(3) ibid. 471.

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"Hypothetical cases were put to your Lordships in argument in which a vendor was supposed to deal personally with a swindler, believing him to be someone else of credit and stability, and under this belief to have actually delivered goods into his hands. My Lords, I do not think it necessary to express an opinion upon the possible effect of some cases which I can imagine to happen of this character, because none of such cases can I think be parallel with that which your Lordships have now to decide."

Lord Hatherley, in his speech, seems to me to have rather put the case of a man's obtaining goods by representing that he was a member of one of the largest firms in London, which would be a case of representation as to authority to contract, as he says (1): "Now I am very far, at all events on the present occasion, from seeing my way to this, that the goods being sold to him as representing that firm, he could be treated in any other way than as an agent of that firm."

The illustration given by Lord Hatherley and the facts in the case of *Hardman* v. *Booth* (2) seem to me to be cases which fall within the second proposition in the headnote in *Edmunds* v. *Merchants' Despatch Transportation Co.* (3), namely, representation by a person present that he was an agent for somebody else so as to induce the seller to make a contract with a third person whom the person present had no authority to bind.

It was argued before me that the principle quoted from Pothier (Traité des Obligations, § 19), in *Smith* v. *Wheatcroft* (4), namely, "Whenever the consideration of the person with whom I am willing to contract enters as an element into the contract which I am willing to make, error with regard to the person destroys my consent and consequently annuls the contract" applies. I do not think, however, that that passage governs this case, because I think the seller intended to contract with the person present, and there was no error as to the person with whom he contracted, although the plaintiff would not have made the contract if there had not

(1) 3 App. Cas. 469
(2) 1 H. & C. 803.
(3) 135 Mass. 283.
(4) 9 Ch. D. 223, 230.

been a fraudulent misrepresentation. Moreover, the case of *Smith* v. *Wheatcroft* (1) was an action for specific performance, and was between the parties to the contract, and had no relation to rights acquired by third parties innocently under the contract, and misrepresentation would have been an answer to the enforcement of the contract. In this case, I think, there was a passing of the property and the purchaser had a good title, and there must be judgment for the defendants with costs.

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Judgment for defendants.

Solicitors for plaintiffs: *Isadore Goldman & Son.*
Solicitors for defendants: *Attenboroughs.*

J. S. H.

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1918.

Nov. 25.

Licensing Acts—New On-Licence—Monopoly Value—Securing to the Public —Surrender of another Beerhouse Licence—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 14.

By s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, the justices on the grant of a new justices' on-licence shall attach to the grant of the licence such conditions as they think best adapted "for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed":—

Held, that where a new on-licence is granted in respect of premises, the justices in fixing the amount of the monopoly value cannot take into account the fact that the owner of the premises has surrendered the licence of another public-house as a condition of the granting of the new licence, this not being a method by which the monopoly value of premises can be secured to the public.

Commissioners of Customs and Excise v. *Curtis* [1914] 2 K. B. 335 followed.

RULE NISI for a writ of certiorari calling upon the defendant, Agnes Ellen Pitfield, to show cause why an order made by justices for the county of Dorset on April 4, 1917, at a meeting of the confirming authority for the county of Dorset, should

(1) 9 Ch. D. 223, 230.

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not be quashed. By that order a certain licence granted at the adjourned general annual licensing meeting for the Bridport division of the county on March 3, 1917, authorizing the defendant to hold an excise licence to sell by retail at the licensed premises situate at Whitchurch Canonicorum in the said county and known as the "Ship Inn" any intoxicating liquor for consumption either on or off the premises, was confirmed. The rule was moved for at the instance of the Commissioners of Customs and Excise.

On March 3, 1917, at the adjourned general annual licensing meeting for the Bridport division of the county of Dorset an application was made on behalf of the defendant for a full licence in respect of an old beerhouse known as the "Ship Inn," Morcombelake, in the parish of Whitchurch Canonicorum.

Evidence was given that there were at the time of the application three licensed houses in this village, all of which were owned by the same firm of brewers. The three houses were (1.) the "Ship Inn," an old beerhouse, (2.) the "Sun Inn," a fully licensed house situate about half a mile from the "Ship Inn," and (3.) the "Star Inn," an old beerhouse.

An offer was made by the owners of the premises to give up the licence of the "Star Inn" if the application for the new licence for the "Ship Inn" was granted; and it was contended on behalf of the applicant that the value of the surrendered licence ought to be taken into account in fixing the monopoly value of the "Ship Inn."

Evidence was given by the manager of the brewers, the owners of the premises, that the value of the "Star Inn" for compensation purposes was over 300*l.*; that if a full licence was granted in respect of the "Ship Inn" the licence duty would be slightly increased, but that no compensation fund charge would be payable in respect of the "Star Inn," the licence of which it was proposed to surrender; and that if surrendered licences could not be taken into consideration in fixing the monopoly value the sum of 200*l.* suggested by the Inland Revenue valuer was a fair sum for the monopoly value payment.

The justices granted the application as an annual licence

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and fixed the monopoly value at 5*l*. An affidavit by the chairman of the justices stated that in fixing the amount of monopoly value at 5*l*. the justices were of opinion that they were securing to the public the difference between the value the premises bore when licensed and the value of the same premises when unlicensed.

On April 4, 1917, an application was made to the confirming authority for the county of Dorset for the confirmation of the licence for the "Ship Inn" granted at the general annual licensing meeting on March 3.

It was contended on behalf of the Commissioners of Customs and Excise that the justices in fixing the amount of the monopoly value of the "Ship Inn" at 5*l*. had improperly taken into account the value of the beerhouse licence of the "Star Inn" which it was proposed to surrender, and that though the justices might possibly take this into account on the question whether they ought to grant a licence to the "Ship Inn," it could not be taken into account in fixing the monopoly value of the "Ship Inn"; that s. 14 of the Licensing Consolidation Act, 1910, (1) required a comparison of two values arising under different circumstances in respect of the same premises, and the fact that another licence in respect of different premises ceased to exist had nothing to do with the matter; that the compensation fund alone benefited through the surrender of the "Star Inn," and that it was not possible to pay to the Exchequer the amount of compensation

(1) Licensing Consolidation Act, 1910, s. 14, sub-s. 1: "The licensing justices, on the grant of a new justices' on-licence, may attach to the grant of the licence such conditions, both as to the payments to be made and the tenure of the licence and as to any other matters, as they think proper in the interests of the public; subject as follows:—

"(*a*) Such conditions shall in any case be attached as, having regard to proper provision for suitable premises and good management, the justices think best adapted for securing to the public any monopoly value which is represented by the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed; . . ."

(*b*) "The amount of any payments imposed under conditions attached in pursuance of this section shall not exceed the amount thus required to secure the monopoly value."

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surrendered, and that the justices had to secure to the public the full monopoly value, which had to be paid into the Exchequer.

It was contended on behalf of the applicant that the surrender of the licence of the "Star Inn" could properly be taken into account in fixing the monopoly value of the "Ship Inn."

It was agreed that the proper monopoly value to impose in respect of the "Ship Inn" was 200*l.* for an annual licence assuming that the value of the surrendered licence of the "Star Inn" could not be taken into account.

The justices by a majority decided to confirm the licence subject to the monopoly payment of 5*l.*

An affidavit by one of the justices stated that in fixing the monopoly value at 5*l.* the justices considered that the licensing justices had rightly exercised their discretion in determining the amount of the monopoly value, and that the sum of 5*l.* so determined by them rightly represented the difference between the value of the premises when licensed and the value of the same premises if they were not licensed.

Sir Archibald Bodkin (*Sir Ernest Goodhart* with him) showed cause. (1) The question to be decided is whether justices in fixing the monopoly value of a licence under s. 14 of the Licensing Consolidation Act, 1910, can take into account the fact that another licence has been surrendered as a condition of the new licence being granted. The conditions imposed under s. 14 of the Act of 1910 on the grant of a new licence are imposed in the interests of the public. The conditions are to be such as the justices think best adapted "for securing to the public any monopoly value." That phrase is, as Channell J. pointed out in *Commissioners of Customs and Excise* v. *Curtis* (2), very vague. Channell J. suggested that although the method

(1) It was first argued that certiorari was not the proper remedy as the justices had jurisdiction to consider the granting of the licence and to fix the monopoly value, even though they had exercised the jurisdiction wrongly, and that either a special case or mandamus was the proper remedy. By consent the Court dealt with the case on the affidavits as if they represented a special case.

(2) [1914] 2 K. B. 335.

of securing the monopoly value contemplated by the section was evidently a money payment, yet possibly the monopoly value might be secured to the public by some other method than by a money payment. In that case a full on-licence had been granted in respect of an old beerhouse, and it was held that the fact that the old beerhouse licence would disappear on the granting of the new licence could not be taken into account in securing to the public any monopoly value in respect of the new licence, but Channell J. suggested (1) as a possible method of "securing to the public any monopoly value" this very case, namely, the surrender of a licence for another public-house as a condition of the licence applied for being granted. The surrender of the "Star Inn" is a mode by which part of the monopoly value of the new on-licence in respect of the "Ship Inn" may be secured to the public. The "Star Inn" being an old 1869 beerhouse the owners were entitled to compensation out of the compensation fund if the licence were taken away. The licence of the "Star Inn" having been extinguished without any claim being made against the fund the public are benefited inasmuch as the compensation fund is relieved to that extent.

[DARLING J. Could not the word "licensed" in para. (a) of s. 14, sub-s. 1, be read as meaning licensed by the licence about to be granted, so that the monopoly value would be the difference between the value which the premises will bear when licensed with the new licence and the value which they bore when not licensed with that licence?]

That construction of the statute was held in *Curtis's Case* (2) not permissible. Channell J. said (3) "the question with which we are dealing turns upon the meaning of the words 'if they were not licensed.' Do those words mean if they were not licensed at all—if they had no licence of any kind—or do they mean if the applicant did not obtain that licence which he was in fact then obtaining?" And later he said that in his judgment their true and natural meaning was "if they were not licensed at all."

[SHEARMAN J. The justices purported to make an order

(1) [1914] 2 K. B. 348. (2) [1914] 2 K. B. 335.
(3) Ibid. 345.

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fixing the monopoly value at 5*l.* whereas it was agreed that the difference between the value of the premises when licensed and the value when unlicensed was 200*l.* Therefore they must have fixed the monopoly value at 200*l.* and arrived at the 5*l.* by deducting 195*l.*, a sum which they thought was secured to the public by the surrender of the licence of the "Star" public-house.]

That is so. That is not an unreasonable interpretation to give to the difficult phrase "securing to the public monopoly value."

Sir Gordon Hewart S.-G. and *Giveen*, for the Commissioners of Customs and Excise, in support of the rule, were not called upon.

DARLING J. This case appears to me to be absolutely covered as far as reasoning goes by the decision of this Court in *Commissioners of Customs and Excise* v. *Curtis*. (1) The meaning which I suggested as a possible meaning of the words of the statute evidently is inadmissible, because Channell J. took exactly the same point in that case where he said (2): "Do those words 'if they were not licensed' mean if they were not licensed at all—if they had no licence of any kind—or do they mean if the applicant did not obtain that licence which he was in fact then obtaining? I am conscious that there is rather a temptation to say they bear the latter meaning." There certainly is a temptation to put that meaning upon them because before I saw that passage I was tempted to put the same construction upon the words, but Channell J. goes on to say that they cannot bear that meaning; and that the true and natural meaning of the words is "if they were not licensed at all." That is a decision of this Court which we ought to follow. Channell J. then put the very case that has arisen here (3), and he suggested that a meaning might possibly be given to the words "securing to the public any monopoly value" which would entitle Sir Archibald Bodkin to succeed in this case; but he only threw it out as a suggestion. Evidently he would have liked to give a different meaning to the

(1) [1914] 2 K. B. 335. (2) Ibid. 345.
(3) Ibid. 348.

words if he could have done so, as it would appear to be only just when a person gives up a licence for one house as a condition of obtaining a new licence for a totally different house, that the value of the licence he is giving up should be taken into account. But it appears to me that the words of the statute are absolutely plain, and that they will not admit of the construction being put upon them which apparently the justices put upon them in this case. I think therefore that this rule should be made absolute.

LORD COLERIDGE J. I agree. The question of monopoly value is dealt with in s. 14, sub-s. 1 (*a*), of the Licensing (Consolidation) Act, 1910, which lays down in the clearest way the method whereby the justices are to assess that monopoly value—namely, "the difference between the value which the premises will bear, in the opinion of the justices, when licensed, and the value of the same premises if they were not licensed." It has been suggested that the abandonment of some other licence can be taken into account in assessing the monopoly value of the licence that is being granted so as to fit into the words in the earlier part of the section "securing to the public any monopoly value," but I think that construction cannot be maintained because the later words of the section are too clear for argument. The matter came before the Court in the case of *Commissioners of Customs and Excise* v. *Curtis* (1), and there Channell J., as my Lord has pointed out, discussed this interpretation and rejected it notwithstanding the temptation to put that interpretation upon the section. The temptation which that learned judge resisted I have the fortitude also to reject. It seems to me that the decision in that case is binding upon us, and that therefore the application for certiorari prevails.

SHEARMAN J. I agree. *Rule absolute.*

Solicitors for defendant: *Godden, Holme & Ward, for A. W. Temple, Bridport.*

Solicitor for Commissioners of Customs and Excise: *Solicitor for Customs and Excise.*

(1) [1914] 2 K. B. 335.

R. F. S.

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March 24.

In re STOKES, DECEASED.

Ex parte MELLISH.

Bankruptcy—Liquidation by Arrangement—Debtor's Business carried on by Trustee—Policy of Life Assurance—Premiums paid by Debtor out of Salary allowed him as Clerk to Trustee—No Knowledge on Part of Trustee in Liquidation—Death of Debtor—Right to Policy and Proceeds thereof.

The trustee of a debtor whose affairs were being liquidated by arrangement under the Bankruptcy Act, 1869, carried on the business of the debtor for practically the whole period of the liquidation, and for that purpose engaged the debtor as his clerk at a salary. During the liquidation the debtor, without the trustee's knowledge, effected a policy on his life and continued to pay the premiums until his death. The liquidation having been closed, the trustee was released and the debtor obtained his discharge. After his discharge the debtor made a will by which he appointed his niece his executrix. The insurance company having declined to pay the policy moneys to the executrix until it had been determined whether they passed under the will of the debtor to her or belonged to the official receiver who was the present trustee in the liquidation:—

Held, that as the original trustee had no knowledge of the existence of the policy or of the payment of the premiums by the debtor, the case was governed by *Tapster* v. *Ward* (1909) 101 L. T. 25, 503, followed in *In re Phillips* [1914] 2 K. B. 689, and the moneys belonged to the official receiver as trustee.

MOTION on behalf of the applicant, Florence Mellish, for a declaration that a policy of assurance on the life of the debtor Stokes effected on October 21, 1881, and the proceeds of the policy were the property of the applicant as against the respondent, the official receiver.

The debtor on December 1, 1879, filed his petition for the liquidation of his affairs by arrangement, and on December 13, 1879, the creditors resolved that his affairs be liquidated by arrangement and not in bankruptcy. On January 23, 1880, a Mr. Wilson was appointed trustee under the liquidation. The trustee carried on the business of the liquidating debtor for practically the whole period of the liquidation and, to enable him to do so, engaged the debtor as his clerk at a salary. On October 21, 1881, the debtor effected the policy on his life with the London Life

Association for 1,000*l.* at an annual premium of 33*l.* 10*s.*, and continued to pay the premiums until his death. On November 7, 1883, the liquidation was closed and Mr. Wilson the trustee was released, and on November 13, 1883, the debtor obtained his discharge. On July 26, 1917, the debtor died at Cape Town, South Africa, having by his will dated July 10, 1915, appointed his niece (the applicant) his executrix. Letters of administration as proof of probate of the will were granted to the applicant by the master of the court at Cape Town. which were forwarded, together with other documents, to the London Life Association on December 27, 1917. The London Life Association declined to pay the policy moneys to the applicant until it had been determined whether they passed under the will of the debtor to the applicant or belonged to the official receiver who was the present trustee in the liquidation and it had been arranged with the senior official receiver, who was now the trustee in the liquidation, that this motion should be brought to obtain the decision of the Court as to the respective rights of the applicant and the trustee to the policy, and that, subject to the approval of the Court, the costs of both parties including a transcript of the shorthand writer's notes of the judgment be paid out of the policy moneys. Mr. Wilson, the original trustee in the liquidation, gave evidence to the effect that he had no recollection of the debtor having told him that the policy had been effected, nor did he know of its existence during the time he was trustee nor that any premiums had been paid, but if they were paid, they were paid by the debtor out of the salary he (the original trustee) allowed him as it was the only money the debtor had.

Hansell for the applicant. By resolving that the debtor's affairs should be liquidated by arrangement the creditors left the debtor a much freer man than if his estate had been administered in bankruptcy. They, in effect, said to the debtor, "We will pay you a salary with which you can do as you like." In *In re Phillips* (1) the bankrupt paid the premiums out of his general estate which ought to have gone to his creditors,

(1) [1914] 2 K. B. 689.

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and the position where the creditors say (as in the present case) "We are content to take your business and we make you a free man to the limited extent of your salary" was not considered. *In re Phillips* (1) does not cover the present case where the premiums have been paid out of moneys not going to the creditors, for during the liquidation the debtor paid them out of his salary and after his discharge out of property he was free to dispose of, and the Court will determine what the trustee ought to do as a fair man between the debtor and his creditors: *In re Tyler* (2); *In re Hall.* (3) Having regard to the particular circumstances of the present case none of the premiums were paid out of the creditors' money and the policy never belonged to the trustee. When the creditors voted for the debtors' discharge they must have meant him to be free to dispose of his property. [*In re Leslie* (4); *Ex parte Tinker* (5); *In re Caughey* (6); *In re Pettit's Estate* (7); and the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, sub-s. 3, were also referred to.]

Tindale Davis for the official receiver. The facts in *Tapster* v. *Ward* (8) were almost identical with those in the present case which is covered by that decision. In *In re Phillips* (1) *Tapster* v. *Ward* (8) was followed.

HORRIDGE J. having stated the facts, continued: I have seen Mr. Wilson, the original trustee, in the box, and I find as a fact that he had no notice whatever about the policy having been effected, or of any premiums having been paid. It is true he says that the first premiums must have been paid out of the salary which was allowed to the liquidating debtor for the assistance he gave in winding up his estate, and he gives as his reason for saying that—that the debtor had no other means of paying them, and he further states he did not know that any premiums were in fact being paid, and therefore this is a case where the policy was effected and the premiums paid from first to last without any knowledge by the trustee or by any successive officer representing the trustee.

(1) [1914] 2 K. B. 689.
(2) [1907] 1 K. B. 865.
(3) [1907] 1 K. B. 875.
(4) (1883) 23 Ch. D. 552.
(5) (1874) L. R. 9 Ch. 716.
(6) (1877) 4 Ch. D. 533.
(7) (1876) 1 Ch. D. 478.
(8) 101 L. T. 503.

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In *In re Tyler* (1) the Court of Appeal affirmed a decision of Bigham J. in which he declined to allow the trustee to intervene and take policy moneys without refunding to the wife of the debtor the premiums paid by her, but in that case the whole matter had been done with the cognizance of the representative of the estate for the time being, although it is true that he was not the main representative involved in the decision itself. That case proceeded entirely upon the principle that the trustee having stood by with knowledge, and allowed the premiums to be paid by the wife, could not intervene and take the benefit of the policy as an honest and upright man without allowing the wife the premiums paid by her. It was put quite tersely in the judgment of Farwell L.J. (2) when he dealt with the case of the wife as follows: "To my mind it would certainly not be in accordance with fair dealing—that open, honest dealing to which reference has been made—that the Court should allow its officer to say, 'I knew the wife was paying, and I let her go on paying, and said nothing to her to lead her to believe that I was going to claim the policy moneys at the end without repaying the premiums which she had paid.'" The same principle appears in *In re Hall* (3) in the judgment of Farwell L.J., where he said: "In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums and the fact that the wife was paying them." The next case with which I wish to deal is *Tapster* v. *Ward*. (4) Let me compare the facts of that case with the facts of the present one. In *Tapster* v. *Ward* (4) the policy was effected before the liquidation. The policy was concealed from the trustee, and after the liquidation had been closed premiums were paid out of his own moneys by the liquidating debtor from 1880 to 1907—27 years. Now in the present case it is quite true the policy was effected during the liquidation and the first premium was paid out of moneys which had been allowed to the debtor by the trustee in respect of his salary. In my

(1) [1907] 1 K. B. 865.
(2) [1907] 1 K. B. 872.
(3) [1907] 1 K. B. 875, 879.
(4) 101 L. T. 25, 503.

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view it does not make any difference that the policy in *Tapster's Case* (1) had been effected before the liquidation, and that in the present case the first premium was paid and the policy effected at a time when the liquidation had commenced. It is not disputed that every contract made on and before liquidation by the liquidating debtor is the property of the trustee. If that be so, this contract of insurance, although the liquidation was in fact proceeding, was the contract of the trustee, and if the trustee had known the premiums were being paid out of the debtor's salary, the trustee could have intervened and said "I want this policy." As regards the subsequent payments which were made from the discharge in 1883 until the assured's death in July, 1917, they are in exactly the same position as the premiums for the policy in *Tapster* v. *Ward* (1); the premiums were paid out of the moneys of the liquidating debtor in each case after he had ceased to be a liquidating debtor and after he had obtained his discharge. In *Tapster* v. *Ward* (2) the Court of Appeal refused to listen to the argument that the trustee ought not to intervene and claim the policy moneys. Towards the end of his judgment Cozens-Hardy M.R. said (3): "In a case like the present where the trustee is absolutely ignorant of the existence of the policy, and where the trustee is absolutely ignorant of any payment made for premiums in respect of it—and, of course, was not guilty of any conduct either proper or improper in respect of those payments—I am unable to see that we should be in the least justified in making such a tremendous extension of the doctrine of *Ex parte James* (4) as we are asked to do."

The last case upon the point is a decision of my own in *In re Phillips*. (5) There the policy had been effected during the time that the bankrupt's discharge was suspended and subsequent premiums had been paid by him until he became a bankrupt the second time. The question arose whether the trustee in the first bankruptcy could claim the policy moneys

(1) 101 L. T. 25, 503.
(2) 101 L. T. 503.
(3) 101 L. T. 504.
(4) (1874) L. R. 9 Ch. 609.
(5) [1914] 2 K. B. 689.

without accounting to the trustee in the second bankruptcy for the premiums which had been paid by the bankrupt in the interval. I held that as the trustee in the first bankruptcy had no notice whatever of the payment of premiums he was under no obligation to make provision out of the policy moneys. It seems clear from *In re Leslie* (1) that a mere volunteer paying premiums has no right to treat them in any way as salvage remuneration to him for keeping the policy alive. This is rather a hard case for this lady (the applicant), but the law of bankruptcy seems to me to be perfectly clear.

The policy was effected after the liquidation resolution, and it belonged to the trustee. The bankrupt never told him that he had effected it, he never told him that he was paying any premiums, and on the authorities to which I have referred it is clear that the policy belonged to the trustee and therefore now belongs to the official receiver. Subject to the payment out of the policy moneys of the costs of this motion there will be an order for payment of the balance to the official receiver.

The motion will be dismissed and there will be a declaration that the policy is part of the property of the debtor divisible amongst his creditors and that the official receiver is entitled to the policy and the policy moneys. Costs as between solicitor and client of the applicant and the official receiver including a transcript of the shorthand note of the judgment to be taxed and paid by the official receiver out of the funds.

Motion dismissed.

Solicitors for applicant: *Stephenson, Harwood & Co.*
Solicitors for official receiver: *Tarry, Sherlock & King.*

(1) 23 Ch. D. 552.

J. E. A.

1919. WILLIAMS, APPELLANT *v.* LETHEREN, RESPONDENT.

April 1.

Adulteration—Food—False Warranty—Summons—Omission to serve Analyst's Certificate—Adjournment of Summons—Second Summons on same Information—Autrefois acquit—Sale of Food and Drugs Act, 1899 (62 & 63 *Vict. c.* 51), *s.* 19, *sub-s.* 2; *s.* 20, *sub-s.* 6.

An information was laid against the appellant under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, for having, in respect of certain milk sold by her, given to the purchaser a false warranty in writing. A summons was issued upon the information and was served upon the appellant, but no copy of the analyst's certificate was served therewith under s. 19, sub-s. 2, and that summons was thus affected by an irregularity. The justices adjourned that summons to a future day, and in the meantime a second summons was issued upon the same information and was duly served upon the appellant together with a copy of the analyst's certificate. Both the summonses then came before the justices, who heard the second summons first and convicted the appellant upon that summons. The first summons was then withdrawn by the prosecution. On a case stated by the justices:—

Held, that the justices had jurisdiction to issue and to hear and determine the second summons notwithstanding that the first summons was still pending; and, further, that the appellant was not entitled to succeed upon a plea of autrefois acquit to the second summons.

Brooks v. Bagshaw [1904] 2 K. B. 798: observations applied.

CASE stated by Swansea justices.

The respondent, Edwin Letheren, a superintendent of police and an inspector under the Sale of Food and Drugs Acts, preferred against the respondent, Sarah Ann Williams, an information under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, for having in respect of certain milk sold by her given to the purchaser a false warranty in writing that the milk was pure fresh milk whereas on analysis it was found to be 41 per cent. deficient in butter fat.

A summons was issued upon the information and served upon the appellant, but no copy of the analyst's certificate was served with the summons. On October 9, 1918, the summons came before the justices, when the appellant's solicitor took the preliminary objection that no copy of the analyst's certificate had been served with the summons upon the appellant, and asked that the summons be dismissed. Having regard to the serious nature of the charge, the

justices adjourned the hearing until October 30, 1918, to enable the respondent if he so desired to withdraw the summons or take out a fresh summons.

On October 9, 1918, the respondent applied for a fresh summons against the appellant, upon the same information resworn on that date, and a summons was granted and made returnable for October 30, 1918, and was served in proper time together with a copy of the analyst's certificate.

On October 30, 1918, the two summonses were before the justices, in one of which there was an informality in procedure, and in the other of which there was no informality, and the justices decided to take the latter summons first.

The justices thereupon heard the second summons, the appellant pleaded not guilty, and evidence was called upon both sides. It was contended for the appellant: (1.) that the first summons ought to be dismissed for non-compliance with s. 19, sub-s. 2, of the Act of 1899, in that a copy of the analyst's certificate was not served on the appellant together with the summons; (2.) that non-compliance with the requirements of that section was not capable of being set right by adjournment and by granting a fresh summons in respect of the same offence or at all; and (3.) that the appellant was entitled to plead autrefois acquit as an answer to the second summons, she having been put in peril under the first summons and that the case should be dismissed. The respondent was not called upon.

The justices were of opinion (1.) that the non-service of the copy of the analyst's certificate with the first summons was merely an informality in procedure and did not go to the jurisdiction of the justices; (2.) that on October 9, 1918, the justices were not bound to dismiss the first summons, but could in their discretion adjourn the hearing thereof, if in the interest of justice they thought fit, notwithstanding that it enabled the respondent to remedy the informality of the first summons by the issue of a second summons; (3.) that on October 30, 1918, the first summons had not been previously determined on October 9, 1918, and was properly before the justices by adjournment; (4.) that a second

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summons could be and had been issued upon the original information within the proper time; (5.) that on October 30, 1918, there being two summonses before the justices, one of which was informal in procedure and the other regular in procedure, they could elect to take the one regular in procedure first; (6.) that the appellant could not be said to have been in peril on the first summons as it had not been disposed of or finally dealt with, and that to enable the appellant to plead autrefois acquit or res judicata there must have been either an acquittal or conviction; (7.) that this case was distinguishable from *Haynes* v. *Davis* (1), inasmuch as in that case there had been a previous dismissal of the first summons, whereas here there was no dismissal of the first summons, nor in fact any hearing or determination of that summons, for after the hearing and determination of the second summons the first summons was withdrawn; (8.) that the appellant could not plead both autrefois acquit and not guilty on the second summons, but should have confined herself to the former plea; and the justices, therefore, convicted the appellant on the second summons, and fined her 20*l*.

Upon the application of the respondent the first summons was then withdrawn.

The question for the Court was whether, upon the above statement of facts the justices came to a correct determination and decision in law.

On February 4, 1919, the appellant received the case stated from the justices.

On February 6, 1919, she gave notice of appeal by case stated upon the same grounds upon which she had relied before the justices.

In December, 1918, E. Letheren, the respondent, had died, and the subsequent proceedings had been against his successor as superintendent of police and against the legal personal representatives of Letheren; but neither side made any point of these facts.

W. A. Barton (*D. O. Evans* with him) for the appellant.

(1) [1915] 1 K. B. 332.

The justices had no power to issue, during the pendency of the first summons, a second summons on the same information. The jurisdiction of the justices to issue a summons is conferred by s. 1 of the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43), and on its true construction that section only authorizes the issue of one summons at a time upon an information. It cannot have been intended that two summonses in respect of the same offence, identical in form, and signed by the same justices, should be issued against the same defendant. The presumption is against the power to issue a second summons, and the burden is not upon the appellant of showing that the power does not exist, but upon the respondent of showing that it does. At all events, the justices had not jurisdiction to hear and determine the second summons while the first was pending. They were bound to hear and determine the earlier summons first. It is provided by s. 14 of the Act of 1848 that on the hearing of a summons the justices shall determine the matter and shall either convict the defendant or dismiss the charge. Here the justices, by disposing of the second summons first and convicting the appellant, in effect prevented themselves from determining the matter of the first summons on its merits and dismissing the charge against her on that summons. By s. 16 of the Act of 1848 power is no doubt given to the justices to adjourn the hearing. Under that section the justices were entitled to adjourn the hearing of the first summons ; but they were not entitled during the adjournment to issue and dispose of a second summons against the appellant.

Secondly, the appellant was entitled to succeed on her plea of autrefois acquit to the second summons. She was put in peril on the first summons, and if that summons had in fact been dismissed, she would undoubtedly have succeeded on that plea to the second summons : *Haynes* v. *Davis*. (1) The first summons was not in fact dismissed, but the justices were in law bound to dismiss it. By s. 14 of the Act of 1848 the justices must either convict the defendant or dismiss the charge. The first summons having been

(1) [1915] 1 K. B. 332.

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served without an accompanying copy of the analyst's certificate was affected by an incurable informality, by reason of which, in the absence of any waiver of it by the appellant, the justices were bound to dismiss that summons: *Batt* v. *Mattinson* (1), and *per* Atkin J. in *Grimble & Co.* v. *Preston.* (2) The appellant was therefore in virtually the same position as if the first summons had been in fact dismissed, and had as good a right to plead autrefois acquit to the second summons as she would in that case have had.

Jowitt for the respondent. The justices had jurisdiction to issue the second summons notwithstanding that the first summons had not been disposed of. It is well settled that on a valid information two or more summonses can be issued until there has been a determination of the matter on its merits: *Brooks* v. *Bagshaw* (3), *per* Lord Alverstone C.J., and *Ex parte Fielding.* (4)

Secondly, the appellant was not entitled to plead autrefois acquit to the second summons. If the justices had jurisdiction to issue a second summons against the appellant on the same information before the first summons was disposed of, it follows that the appellant cannot have been in the same position as if the first summons had been dismissed, and cannot have had a right to plead autrefois acquit to the second summons. Further, a summons may be withdrawn by the prosecutor by leave of the Court, even although the defendant objects: *Davis* v. *Morton* (5); *Hopkins* v. *Hopkins* (6); and *Rex* v. *Tyrone Justices* (7), and the withdrawal of the summons, at all events on a technical ground, does not put an end to the information or complaint upon which it is founded and entitle the defendant to plead autrefois acquit to a second summons on the same information: *Davis* v. *Morton* (5) and *Rex* v. *Tyrone Justices* (7), disapproving the dictum to the contrary of Jeune P. in *Pickavance* v. *Pickavance.* (8) Therefore, if in the present case the first summons had been withdrawn before the second

(1) (1900) 82 L. T. 800.
(2) [1914] 1 K. B. 270.
(3) [1904] 2 K. B. 798.
(4) (1861) 25 J. P. 759.
(5) [1913] 2 K. B. 479.
(6) [1914] P. 282.
(7) [1912] 2 I. R. 44.
(8) [1901] P. 60.

was disposed of, the appellant would not have been entitled to plead autrefois acquit to the second summons; and she has no greater right to do so because the first summons was withdrawn after the second had been disposed of. The appellant was never in peril on the first summons.

Barton in reply. In *Ex parte Fielding* (1) the first summons had not been served, so that there was no operative summons in existence at the time when the second summons was issued. It does not appear that a second summons has ever before been issued while a previous summons on the same information has remained undisposed of.

BRAY J. The facts of this case are few and simple. An information under s. 20, sub-s. 6, of the Sale of Food and Drugs Act, 1899, was preferred by the respondent against the appellant alleging that the appellant in respect of certain milk sold by her gave to the purchaser a false warranty in writing. On that information a summons was issued and served upon the appellant. On October 9, 1918, the summons came on for hearing when the appellant's solicitor objected to the proceedings on the ground that no copy of the analyst's certificate had been served with the summons upon the appellant, and asked that the summons should be dismissed. The justices did not take that course but adjourned the hearing of the summons until October 30, 1918. Meanwhile the respondent applied for a fresh summons on the same information resworn, which was granted and made returnable for October 30, 1918. That summons was served within the proper time together with a copy of the analyst's certificate. On October 30, 1918, the two summonses were before the justices, one in which there was an informality, and the other in which there was no informality. The justices took the latter summons first. The appellant put forward the plea of autrefois acquit, but the justices decided against her on that plea. She then pleaded not guilty, whereupon the justices heard the summons, evidence was called on both sides, and the appellant was convicted, but obtained this case stated.

(1) 25 J. P. 759.

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The question is whether the conviction can stand. On behalf of the appellant two objections have been taken to the conviction. It has been said, first, that the justices had no jurisdiction, during the pendency of the first summons and on the same information, to issue the second summons under which the conviction was obtained; and, secondly, that the appellant was entitled to succeed on her plea of autrefois acquit to the second summons on the ground that she had been put in peril on the first summons and that if that summons had been heard and determined it must, by reason of the informality which affected it, have been dismissed in her favour. It seems to me that the former of these objections is the one of real importance in this case, because, if there was jurisdiction to issue a second summons against the appellant during the pendency of the first summons, she cannot be treated as having been acquitted under the first summons and as being entitled on that ground to plead autrefois acquit to the second summons. I, therefore, think that the main question is whether or not the justices had jurisdiction after the first summons had been issued and served and while it was still pending to issue the second summons on the same information. That question has in my opinion already been decided. In *Brooks* v. *Bagshaw* (1) Lord Alverstone C.J. said: "Ever since the decision in *Ex parte Fielding* (2) it has been held that on a valid information two or more summonses in succession can be issued unless and until there has been a determination of the matter on its merits." That case seems to me to be a clear authority for saying that where, as in the present case, there has been no determination of the matter on the first summons, the justices have jurisdiction to issue a second summons on the same information. If the case of *Ex parte Fielding* (2) be referred to it will be found that Blackburn J. observed in the course of the argument: "Why should not several summonses issue on one information? If the first summons could not be served, why should it be necessary that a second information should be laid before the issuing of every

(1) [1904] 2 K. B. 798, 801. (2) 25 J. P. 759.

subsequent summons?" Having regard to these decisions I can come to no other conclusion in the present case than that the justices had jurisdiction to issue the second summons notwithstanding that the first summons was still pending.

It is said that in adjourning the first summons and hearing the second summons first the justices followed a wrong procedure. That may or may not be so, but in any case they did not by taking that course deprive themselves of the jurisdiction which they acquired when the second summons was issued of hearing and determining that summons.

It follows from what I have said that the appellant is not entitled to succeed upon the plea of autrefois acquit to the second summons.

In my opinion the conviction was right, and the appeal should be dismissed.

A. T. LAWRENCE J. I am of the same opinion. The Act of 1899 provides that a copy of the analyst's certificate must be served along with the summons. That provision is intended to be for the advantage of the accused, its object being to insure that he shall be informed of the particulars of the offence with which he is charged. In the present case, therefore, the justices, in adjourning the first summons, with which no copy of the analyst's certificate had been served, in order that a fresh summons might be issued which should comply with the statutory requirement, were acting in the interest of the appellant. A fresh summons was afterwards issued upon the same information, which was resworn, and that summons was served and a copy of the analyst's certificate was duly served along with it. The appellant thereupon came before the justices with all the information she could demand or require, and the justices proceeded to hear and determine the second summons. It was said that the justices had no jurisdiction to hear the second summons because the first summons had not been withdrawn. It has, however, been decided, as has already been pointed out, that more than one summons can be issued upon the same information, and it would seem that any one of the summonses issued

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can be heard independently of the others. That being so, I cannot understand how the non-withdrawal of the first summons can exclude or diminish the jurisdiction to hear the second summons, or how the withdrawal of the first summons can confer or supplement the jurisdiction which the justices all along possessed of hearing the charge. It seems to me that the jurisdiction to hear the later summons existed ever since that summons was issued, and that it is in no way affected by the non-withdrawal of the earlier summons. As to the argument that the appellant is entitled to plead autrefois acquit to the second summons, that plea can have no application here, as there was no determination of the first summons.

SHEARMAN J. I agree. I think nevertheless that we should not encourage a practice of having two summonses upon the same information in the paper for hearing before the justices upon the same day. It would have been better that the justices should have determined that the first and irregular summons should be withdrawn and that another regular summons should be taken out in its place. The fact that that was not done did not, however, interfere with the jurisdiction of the justices to hear and determine the second summons. I think that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *T. D. Jones & Co., for C. H. K. Newcombe, Swansea.*

Solicitors for respondent: *Walter Crimp & Co., for Jenkin Jones & Co., Swansea.*

J. R.

In re COHEN.

Ex parte THE OFFICIAL RECEIVER.

1919

March 24; *April* 7.

Bankruptcy—Title to after-acquired Property—Second Bankruptcy—Right of Trustee in First Bankruptcy to prove in Second Bankruptcy—Bankruptcy and Deeds of Arrangement Act, 1913 (3 & 4 *Geo.* 5, *c.* 34), *s.* 11, *sub-s.* 3—*Bankruptcy Act*, 1914 (4 & 5 *Geo.* 5, *c.* 59), *s.* 39, *sub-s.* 1; *s.* 168, *sub-s.* 2.

By s. 39 of the Bankruptcy Act, 1914 (which embodies s. 11, sub-s. 3 of the Bankruptcy and Deeds of Arrangement Act, 1913): "In the event of a second or subsequent receiving order being made against a bankrupt, any property acquired by him since he was last adjudged bankrupt, which at the date when the subsequent petition was presented had not been distributed amongst the creditors in such last preceding bankruptcy, shall . . . . vest in the trustee in the subsequent bankruptcy, but any unsatisfied balance of the debts provable under the last preceding bankruptcy may be proved in the subsequent bankruptcy by the trustee in the last preceding bankruptcy." By s. 168, sub-s. 2, of the Act of 1914: "This Act shall apply to proceedings under the Bankruptcy Acts, 1883 to 1913, pending at the commencement of this Act, as if commenced under this Act." The Bankruptcy and Deeds of Arrangement Act, 1913, came into operation on April 1, 1914.

A receiving order was made against a debtor in 1908, and in the same year he was adjudicated a bankrupt. A second receiving order was made against him in April, 1911, and in May, 1911, he was again adjudicated a bankrupt. The official receiver was now trustee in both bankruptcies. Subsequently to December, 1916, the official receiver received sums amounting to 2345*l.* 13*s.*, which represented the bankrupt's share of the proceeds of a war contract entered into by the bankrupt in August, 1916, jointly with another person. A sum of 16*l.* 9*s.* 8*d.* had also been received by the official receiver, being the balance of certain shares acquired by the bankrupt in November, 1911, but not realized until June, 1914:—

Held, that the effect of s. 168, sub-s. 2, of the Act of 1914 is that s. 39 applies not only to receiving orders made after April 1, 1914, but to any receiving orders made at any earlier period, and that therefore the official receiver as trustee in the second bankruptcy was entitled to the sum of 2345*l.* 13*s.* As to the sum of 16*l.* 9*s.* 8*d.*, as this was acquired after the second bankruptcy, this also belonged to the official receiver in respect of the second bankruptcy. The official receiver, as trustee in the first bankruptcy, would have the right to prove given by sub-s. 1 of s. 39 of the Bankruptcy Act, 1914.

In re Cullwick [1918] 1 K. B. 646 explained and followed.

APPLICATION for directions by the official receiver, as trustee in two bankruptcies of the debtor, to a registrar in bankruptcy, and referred by him to the judge.

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A receiving order was made against the bankrupt on March 17, 1908, and he was adjudicated a bankrupt on April 13, 1908. A second receiving order was made against the bankrupt on April 4, 1911, and on May 2, 1911, he was again adjudicated a bankrupt. The official receiver was now the trustee in both bankruptcies.

In December, 1916, it came to the knowledge of the official receiver that there were two accounts at the Piccadilly Branch of the London County and Westminster Bank, Ltd., opened in the name of the bankrupt, and as a result of the inquiries which followed it was ascertained that the sum of 4896*l.* 8*s.* 7*d.* which at a later date stood to the credit of one of the accounts (hereinafter called No. 2 account) represented the proceeds of a war contract for the sale and delivery of cardigan jackets entered into in August, 1916, by the bankrupt and one, Abraham Henry, with the Italian Delegation. It was also ascertained that the bankrupt was jointly interested as partner or co-adventurer with Henry in the war contract, and in consequence on December 16, 1916, the official receiver as trustee intervened and claimed the bankrupt's interest in the contract and in the funds standing to his credit at the bank. On December 20, 1916, the official receiver agreed by way of settlement with Henry that out of the funds at the bank (No. 2 account) a sum of 2150*l.* should be paid by the bank to Henry as his share of the partnership or joint venture.

On February 20, 1917, Henry commenced proceedings against the bankrupt in the Chancery Division claiming (inter alia) an account of all moneys received by the bankrupt on behalf of the partnership business of Cohen & Henry and payment of whatever might be found to be due to him, and on April 26, 1918, the official receiver was joined as a defendant in the proceedings in his capacity as trustee. In the course of the proceedings Henry claimed to set aside the settlement of December 20, 1916, on the ground of alleged misrepresentations by the bankrupt. The action came on for trial before Younger J. on November 20 and 22, 1918, and on the second day of the hearing counsel for Henry intimated to the Court that he did not propose to proceed further with his claim, and judgment

was thereupon given in favour of the defendants with costs which had not yet been taxed. The amount received by the official receiver from No. 2 account was 2339*l.* 1*s.* 3*d.*, and this sum now stood to the credit of a suspense account pending the decision of the Court as to whether it should be treated as assets in the first or second bankruptcy. The sum was derived wholly from the profits of the war contract.

The official receiver had also realized a sum of 6*l.* 11*s.* 9*d.*, being the amount standing to the credit of the bankrupt's No. 1 account at the bank on December 31, 1916. This sum (which was also on suspense account) was part of a larger sum transferred from the No. 2 account to No. 1 account, and was originally derived from the proceeds of the war contract. The total amount received by the official receiver representing the proceeds of the war contract was therefore 2345*l.* 13*s.*

On June 8, 1914, the official receiver realized the nett sum of 48*l.* 14*s.* 6*d.* in respect of certain shares acquired by the bankrupt about November, 1911, and after payment thereout of preferential rates and fees in the first bankruptcy the sum of 16*l.* 9*s.* 8*d.* remained undistributed.

The questions raised were :—

1. Whether the sums of 2339*l.* 1*s.* 3*d.* and 6*l.* 11*s.* 9*d.*, being the proceeds of business carried on by the bankrupt in 1918, i.e., after April 1, 1914, when the bankruptcy and Deeds of Arrangement Act, 1913, s. 11, sub-s. 3 (now the Bankruptcy Act, 1914, s. 39), came into operation, were the property of the official receiver as trustee in the first bankruptcy or as trustee in the second bankruptcy.

2. Whether the sum of 16*l.* 9*s.* 8*d.*, being the balance of the property acquired by the bankrupt in November, 1911, i.e., before the Bankruptcy and Deeds of Arrangement Act, 1913, and realized by the official receiver in June, 1914, i.e., after that Act came into operation, was the property of the official receiver as trustee in the first bankruptcy or as trustee in the second bankruptcy.

The registrar directed that a separate solicitor should be instructed to represent the official receiver as trustee in the

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second bankruptcy, and at the request of the applicant adjourned the application to the judge, as in his (the registrar's) opinion it involved questions of difficulty on the ground of novelty arising under what is now the Bankruptcy Act, 1914, s. 39.

Hansell for the official receiver as trustee in the first bankruptcy. The question as to the sum of 2345*l.* 13*s.* is whether s. 39, sub-s. 1, of the Bankruptcy Act, 1914, which re-enacted s. 11, sub-s. 3, of the Bankruptcy and Deeds of Arrangements Act, 1913, operates with regard to property acquired by the bankrupt after the new law created by the Act of 1913 came into operation (April 1, 1914) where both bankruptcies occurred before that date. *In re Cullwick* (1) is distinguishable. In that case the third bankruptcy occurred in 1916 after April 1, 1914, when the new law came into operation, but in the present case both bankruptcies occurred before that date, and therefore *In re Cullwick* (1) does not apply. The shares were acquired by the bankrupt in November, 1911, after the second bankruptcy but before the date of the new law, but they were not realized till June, 1914, after the new law came into operation. Before the operation of the new law the property would have vested in the trustee in the first bankruptcy. Sect. 39, sub-s. 1, of the Act of 1914 is only meant to be operative after April 1, 1914, the date when the new law became operative. The receiving order mentioned in the sub-section means a receiving order made after April 1, 1914. A post-1914 bankruptcy has, under the statute, new rights of its own, but it was not intended to give new rights to a trustee in a bankruptcy occurring before the new law operated. The words "being made" in the sub-section mean "being made in future." If they were meant to apply to a bankruptcy occurring before the new law they would have been "having been or being made." In the present case there was no bankruptcy under the altered system. Even though the effect of s. 168, sub-s. 2, of the Act of 1914, is that the Act applies, the question as to the true construction of the statute still remains.

(1) [1918] 1 K. B. 646.

Certain portions of it may be inapplicable. Sect. 168, sub-s. 2, does not apply unless there is a bankruptcy subsequent to the new law coming into operation. It is true that the answer to question 3 (*a*) in *In re Cullwick* (1) is capable of covering the present case, but the point was not before the Court.

Tindale Davis for the official receiver as trustee in the second bankruptcy. The present case is covered by *In re Cullwick*. (1) There are no words of limitation in s. 39 of the Bankruptcy Act, 1914, showing that it was only intended to apply to bankruptcies occurring after the new law came into operation. Sect. 168, sub-s. 2, clearly makes the Act of 1914 retrospective.

Hansell in reply. If the operation of the Bankruptcy Act, 1914, is held to be retrospective the effect will be that all property acquired by a bankrupt after his first bankruptcy, at present undistributed and vested in his trustee in his first bankruptcy, will be divested from that trustee. Having regard to the large undistributed balances which are in the hands of trustees under first bankruptcies it is difficult to suppose that that could have been the intention of the Legislature.

Cur. adv. vult.

April 7. The following judgment was read by

HORRIDGE J. The facts upon which the questions argued before me have arisen are as follows :—

A receiving order was made against the bankrupt on March 17, 1908, and he was adjudicated a bankrupt on April 13, 1908. A second receiving order was made against the same bankrupt on April 4, 1911, and on May 2, 1911, he was again adjudicated a bankrupt. The official receiver is now the trustee in both bankruptcies. Subsequently to December 20, 1916, the official receiver received sums amounting to 2345*l.* 13*s.*, which represent the proceeds of a war contract entered into by the bankrupt in August, 1916, jointly with one Abraham Henry.

The question arises whether this sum of 2345*l.* 13*s.* belongs to the official receiver as representing the estate under

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the first adjudication in bankruptcy or to him as representing the estate under the second adjudication in bankruptcy.

Sect. 11, sub-s. 3, of the Bankruptcy and Deeds of Arrangement Act, 1913, which is now embodied in s. 39 of the Bankruptcy Act, 1914, altered the existing law and came into operation on April 1, 1914, and therefore both bankruptcies were antecedent in date to that section coming into effect.

It was contended before me on behalf of the official receiver as representing the estate under the first bankruptcy that s. 39 of the Bankruptcy Act, 1914, had only retrospective effect when one of the subsequent bankruptcies had taken place after April 1, 1914, the date of the coming into operation of the Bankruptcy and Deeds of Arrangement Act, 1913, and that therefore according to the old law existing before that time the property belonged to the representative of the estate under the first bankruptcy: *In re Clark.* (1) In *In re Cullwick* (2) I decided that where there were three bankruptcies, one of which took place after the coming into operation of the Bankruptcy and Deeds of Arrangement Act, 1913, s. 39 of the Bankruptcy Act, 1914, applied as between the first and second bankruptcies which were before April 1, 1914. In that case I dealt with the retrospective effect of s. 39 (3), and I held, having regard to s. 168, sub-s. 2, of the Bankruptcy Act, 1914, the Act of 1914, including s. 39, applied to pending bankruptcies, and I said I could not see why it should not apply in that case equally, as between the first and second bankruptcies. I think s. 168, sub-s. 2, means that I should treat the two earlier bankruptcies as if they were commenced under the Bankruptcy Act, 1914, and that, therefore, s. 39 applies not only to receiving orders made after April 1, 1914, but to any receiving orders made at any earlier period.

The words of s. 39 "in the event of a second or subsequent receiving order being made," as they do not include the words "having been made" might at first sight imply that the section only applies to receiving orders made after April 1, 1914, but I think if proceedings are to be treated as commenced under the 1914 Act, then the words "second or subsequent

(1) [1894] 2 Q. B. 393. (2) [1918] 1 K. B. 646.
(3) [1918] 1 K. B. at p. 653.

receiving order being made " naturally apply to any receiving order made at a period later than the date of the first receiving order, although the subsequent receiving order may be made before April 1, 1914. In my view this point was really decided in *In re Cullwick* (1) as the language I then used in the answer I gave to question 3 (*a*) would cover the point raised on the present application. My view is that s. 39 was intended in cases of successive bankruptcies to apply, whatever their date, as regards property which was acquired in the right of the bankrupt since he was last adjudged bankrupt and which at the date when the subsequent petition was presented had not been distributed amongst the creditors in a preceding bankruptcy.

I think the trustee in the second bankruptcy is entitled to the sum of 2345*l.* 13*s.*

There was a smaller point argued before me as to a sum of 16*l.* 9*s.* 8*d.*, being the balance of certain property acquired by the bankrupt in November, 1911, but not realized until June, 1914. As this was acquired after the second bankruptcy, I think this also belongs to the official receiver in respect of the second bankruptcy. The official receiver as trustee in the first bankruptcy will, of course, have the right to prove given at the end of sub-s. 1 of s. 39 of the Bankruptcy Act, 1914.

The costs of this application and the costs of the applicant in the action of *Henry* v. *Cohen*, and his trustee in bankruptcy, so far as the same may not be recovered from the plaintiff, and the costs of all parties to this motion will come out of the said sums of 2,345*l.* 13*s.* and 16*l.* 9*s.* 8*d.*

Solicitor for official receiver as trustee in first bankruptcy : *Solicitor to Board of Trade.*

Solicitors for official receiver as trustee in second bankruptcy : *Tarry, Sherlock & King.*

(1) [1918] 1 K. B. 646.

J. E. A.

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April 10.

OATEN *v.* AUTY.

Justices—Appeal—Case stated—Person aggrieved by Conviction, Order or Determination—Offence proved, but Information dismissed—Summary Jurisdiction Act, 1857 (20 & 21 *Vict. c.* 43), *s.* 2—*Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 33—*Probation of Offenders Act*, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1.

A person was charged under the Military Service Acts, 1916 and 1918, with failing to appear when called out to attend for military duty. He claimed that he came within the exception contained in those Acts in favour of "regular ministers of any religious denomination." The justices were not satisfied that he came within the exception, and they found the offence proved but dismissed the information under the Probation of Offenders Act, 1907, considering it inexpedient to inflict any punishment:—

Held, that there had been a "determination" by the justices within the meaning of that expression in s. 33 of the Summary Jurisdiction Act, 1879, and that the accused was entitled to appeal therefrom by way of case stated.

Per Curiam: The justices were wrong in applying the Probation of Offenders Act, 1907, in such a case.

Per Avory J.: The words, "the Court may, without proceeding to conviction, make an order," etc., in s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, should be construed as meaning "the Court may, without proceeding to record the conviction, make an order," etc.

CASE stated by Yorkshire (West Riding) justices.

An information was preferred by the respondent Auty against the appellant Oaten, alleging that he, being deemed to have been duly enlisted under the Military Service Acts, 1916 and 1918, failed, without lawful excuse, to appear at the time and place at which he was required upon being called out to attend.

At the hearing it was admitted or proved that the appellant was, by virtue of the Military Service Acts, deemed to have been duly enlisted in the Army, unless he came within the exception from the provisions of those Acts of "men in holy orders or regular ministers of any religious denomination." The appellant was duly called out, and failed to appear, claiming to be exempted by reason of being the regular minister of a religious denomination called "Spiritualists." Evidence was given as to the body known as the Spiritualists' National

Union, as to their churches and doctrine, and as to the position and duties of the appellant; and upon that evidence the justices said they were not satisfied that the appellant was a "man in holy orders or a regular minister of any religious denomination," or that the union or any church connected therewith was a religious denomination within the meaning of the exception, and therefore they considered that the appellant must be deemed to have been duly enlisted in His Majesty's regular forces or in the reserve, and to have been forthwith transferred to the reserve. They said: "We were of opinion that the offence was proved, but were of opinion that it was inexpedient to inflict any punishment, and therefore, under the Probation of Offenders Act, 1907, we dismissed the said information." In the register of the court, under the heading, "Minute of Adjudication," was this entry: "Plea—not guilty. Offence proved, dismissed under the Probation of Offenders Act, inexpedient to punish."

The question for the opinion of the Court was whether the justices came to a correct determination and decision in point of law.

The case came in the first instance before a Divisional Court, consisting of Darling, Bray and Avory JJ., when the point was raised whether in the circumstances the appellant was entitled to appeal by way of case stated. That question was ordered to be argued before a Court consisting of five judges, and now came on for argument.

Hawke K.C. and *Valentine Ball* for the appellant. This appeal is competently brought. The justices have decided that the appellant is not within the exception contained in the first schedule to the Military Service Act, 1916, or the similar exception in the first schedule to the Military Service (No. 2) Act, 1918, as "a regular minister of any religious denomination"; that is, they have decided that he is liable under those Acts to military service; and therefore that the offence alleged against him of being an absentee was proved. The justices determined that, although, acting under the Probation of Offenders Act, 1907, they dismissed the infor-

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mation, deeming it inexpedient to inflict any punishment. There has thus been a " determination " within the meaning of that expression in s. 2 of the Summary Jurisdiction Act, 1857, and s. 33 of the Summary Jurisdiction Act, 1879, and as the appellant is aggrieved thereby he was entitled to ask for a case to be stated for the opinion of this Court. It has been suggested that the " determination " means the actual termination of the particular proceedings without regard to the steps by which that result has been reached; and it is said that the " determination " here was the dismissal of the information. That suggestion is not well founded. The " determination " is the finding of the offence proved. If the appellant is precluded from questioning that determination a serious hardship will be inflicted upon him, for by the finding he is characterized as a person who has failed to perform his duty to his country.

Branson for the respondent. The difficulty in this case has been occasioned by the justices applying to its facts the provisions of the Probation of Offenders Act, 1907, to which obviously they have no application. But in view of what the justices have done no appeal is competent by the appellant. It has been held that an appeal lies by the prosecutor where an information has been dismissed under the provisions of s. 16 of the Summary Jurisdiction Act, 1879, which are similar in terms to those of the Probation of Offenders Act, 1907 (*Phillips* v. *Evans* (1) and *Barnard* v. *Barton* (2)); but it has never been decided that the accused has any right to appeal in such a case. The argument for the appellant involves that the justices' decision can be severed, one part finding the offence proved, and the other dismissing the information. That cannot be done. The order is one, and indivisible, just as in *Felstead* v. *The King* (3) the verdict of " guilty, but insane," was held by the House of Lords not to be severable, and consequently that the person against whom that verdict had been found was not entitled to appeal to the Court of Criminal Appeal, he not being a convicted

(1) [1896] 1 Q. B. 305. (2) [1906] 1 K. B. 357.
(3) [1914] A. C. 534.

person within s. 3 of the Criminal Appeal Act, 1907. Taking the justices' order in this case as a whole it amounts to an acquittal, and consequently no appeal lies therefrom at the instance of the accused.

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DARLING J. This case comes before the Court on a case stated by justices, but before we reach the point which the appellant is anxious to have decided, namely, whether he is a regular minister of a religious denomination and therefore not liable to serve under the Military Service Acts, there is this question which lies on the threshold of the whole inquiry, namely, whether it is open to the appellant to come here at all upon a case stated. The appellant was prosecuted under the Military Service Acts. He claimed that he was not liable to serve because he was a regular minister of a religious denomination. The justices came to the conclusion that the appellant was liable, but as it was a test case, they took a course which I think was not open to them in a case of this kind involving the very grave question whether the appellant was liable to render military service to his country. They said: "We were of opinion that the offence was proved"—that is, that the appellant was liable to military service and that he absented himself from service—"but were of opinion that it was inexpedient to inflict any punishment, and therefore, under the Probation of Offenders Act, 1907, we dismissed the said information." They say that they were not satisfied that the appellant was "a man in holy orders or a regular minister of any religious denomination," and therefore they considered that he must be deemed to have been duly enlisted in the regular forces or in the reserve forces. They then propound the question for this Court whether they came to a correct determination.

The point has been taken that nothing has been done which lays the foundation for a case being stated by the justices under the Summary Jurisdiction Acts, 1857 and 1879. Sect. 2 of the Act of 1857 says that justices may state a case where a party is dissatisfied with their determination as being erroneous in point of law. There the only material

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word is "determination." By s. 33 of the Act of 1879 "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction," may apply to the Court to state a special case. Then by s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, it is provided that "where any person is charged before a Court of summary jurisdiction with an offence punishable by such Court, and the Court thinks that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the Court may, without proceeding to conviction, make an order either (i.) dismissing the information or charge; or (ii.) discharging the offender conditionally on his entering into a recognizance. . . . ." In this case the justices dismissed the information, and it is said there was no conviction, order, or determination from which an appeal lies at the instance of the present appellant. The words of s. 1 of the Probation of Offenders Act, 1907, are unscientific, thoroughly illogical, and are merely a concession to the modern passion for calling things what they are not; for finding people guilty and at the same time trying to declare them not guilty. Here the justices have found the offence proved—they use the word "offence"—and they make an entry to that effect in the register of the Court, but because they acted under the Probation of Offenders Act, 1907, and considered it inexpedient to inflict any punishment, it is said that no appeal lies. If this appellant cannot appeal a grave injustice might be done. At present, he is found to be a person liable to military service, that he refuses to serve, and that he absented himself. That is an offence under the Military Service Acts. As far as we know he is a man of high character and position in this sect, and it is found against him that he is a man who will not do his

duty by his country. Why then do the justices not punish him? They say they take advantage of the Probation of Offenders Act, and do not proceed to conviction. For the respondent it is said they have taken a course which prevents the appellant appealing and getting rid of the stigma put upon him. If the stigma has been unjustly put upon him it is not surprising that he desires to come here to get the finding altered, but he can only do so if he can show that what the justices have done comes within one or other of the words in s. 33 of the Summary Jurisdiction Act, 1879. Can he show himself to be aggrieved by a "conviction"? There has been no conviction. He cannot therefore appeal on that ground. Has there been an "order"? I feel some difficulty in saying that an appeal lies against the justices' order, because their order is one dismissing the information. I do not however require to go that length because the section contains another word, namely, the word "determination." The appellant says he is aggrieved by the "determination" of the justices. What did they determine? I think they determined as a matter of law that the appellant was not exempted by the Military Service Acts from the obligation of serving with the forces. That in my opinion is a "determination" from which he can appeal. The order, it is true, dismisses the information, but that order depends upon a determination which in ordinary circumstances would amount to a conviction. The order follows the determination a part of the way but not the whole way. The whole resulted in no conviction as that word is used in the Probation of Offenders Act, 1907. *Rex* v. *Ireland* (1) and *Felstead* v. *The King* (2) show that the word "conviction" is a verbum aequivocum, a word of very uncertain meaning. It is a great pity that a word is so used as to become more equivocal even than it was in the Middle Ages. The Probation of Offenders Act, 1907, has allowed the justices to find all the facts that make a person guilty but to enter in their record that he is not guilty. The logical and proper procedure would have been to provide that the justices should record that in view

(1) [1910] 1 K. B. 654. (2) [1914] A. C. 534.

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of the trivial nature of the particular offence or for one or other of the reasons mentioned in the Act no punishment would be inflicted and the accused might appeal, punishment or no punishment, in this case against the stigma placed upon him as a person who has broken a law which goes to the safety of the country. For the reasons I have given I think that, notwithstanding all the ambiguities and difficulties with which the point has been involved by the Legislature, an appeal lies in this case.

BRAY J. I arrive at the same conclusion but not for the same reasons. It is quite clear that no appeal lies unless it is given by statute. We have therefore to see whether by any statute a right of appeal has been given in this case. I propose to refer first to the Summary Jurisdiction Act, 1848, s. 14 of which provides for the procedure at the hearing of an information or complaint and deals with the evidence and speeches, and then it continues: "And the said justice or justices, having heard what each party shall have to say as aforesaid, and the witnesses and evidence so adduced, shall consider the whole matter, and determine the same, and shall convict or make an order upon the defendant, or dismiss the information or complaint, as the case may be." If they convict, the conviction is to be drawn up in proper form, and if they dismiss the information or complaint, they may make an order of dismissal and give the defendant a certificate thereof. Stopping there for a moment, it is clear that the justices have to determine, that is, make an end of the matter by saying either that the accused is convicted or that the information is dismissed. The next statute is the Summary Jurisdiction Act, 1857, which gives the right to appeal by way of case stated. Sect. 2 of that Act enables a party who is dissatisfied with the justices' determination as being erroneous in point of law to apply for a case to be stated. The "determination" there mentioned means the determination under s. 14 of the Act of 1848, which results either in a conviction or in the dismissal of the information. Next comes the Summary Jurisdiction Act, 1879, which is to be

construed as one with the Act of 1848. By s. 33 of the Act of 1879 "any person aggrieved who desires to question a conviction, order, determination, or other proceeding of a Court of summary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction" may ask for a case to be stated. It is to be observed that s. 16 of the Act of 1879 gives a power, not precisely the same, but very similar to that contained in s. 1 of the Probation of Offenders Act, 1907, namely, the power, if the offence is proved but is of a trivial nature, to dismiss the information. Then comes the Probation of Offenders Act, 1907, which by s. 1, sub-s. 1, provides that where the justices think that the offence charged is proved but are of opinion that "having regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment . . . . [they] may, without proceeding to conviction, make an order either (i.) dismissing the information or charge; or (ii.) discharging the offender conditionally on his entering into a recognizance. . . . ." It is said that it may be a great hardship upon an accused if he is dealt with under that section and so has a finding that the charge preferred against him has been proved and he be without a right of appeal. That may be so. But the fact does not justify us in distorting the language of the statute. In this case I cannot construe what was done by the justices as a "conviction." I therefore disregard that word, and I come to the word "order." The only order made was one dismissing the information. The complainant of course might appeal in such a case, and if he had done so on the ground that the justices had no jurisdiction to profess to act under the Probation of Offenders Act I should have agreed with his contention. Part of the difficulty here is due to the fact that the justices have come to the absurd conclusion that the offence was proved but did not deserve punishment. When the offence proved is failure to perform military service the justices never should act under the Probation of Offenders

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Act, 1907, or under the similar provision of the Summary Jurisdiction Act, 1879. I think there was no "order" in this case from which the appellant could appeal. As to the word "determination," I should say that, apart from the Military Service Act, there was no "determination" here. Of course a statute may make that a "determination" which but for its language would not be one. In my opinion s. 1, sub-s. 2, of the Military Service Act, 1916, has done this, because it says inter alia that "if any question arises in any legal proceeding under any of those Acts . . . . whether any man is a man who is under this section deemed to have been enlisted and transferred to the reserve or not"—that is the question which arose in this case and the justices decided it against the appellant—"the Court may require the man to give evidence on the question, and if satisfactory evidence is not given to the contrary the man shall be deemed to have been so enlisted and transferred." The effect of that is that the justices have to determine whether or not satisfactory evidence is given by the man that he is not deemed to have been enlisted and transferred to the reserve, and as in these proceedings they determined that satisfactory evidence was not given by this appellant there was a "determination" from which an appeal lies. On this ground I think the appeal can be heard.

A. T. LAWRENCE J. I agree with the judgment of Darling J. The question is one of substance. The truth is, as was pointed out by Mr. Branson, that this was not a case for the application of the Probation of Offenders Act. What we are asked is whether the justices came to a correct determination in point of law. What is the determination to which they have come? They neither convicted nor acquitted the appellant, and he is entitled, like every other subject, to have the offence dealt with to the end either by acquittal or conviction. What they have said is that the offence was proved but they did not think proper to inflict any punishment and they applied the Probation of Offenders Act. That Act, in my view, was not applicable at all. Not one of the conditions mentioned

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A. T. Lawrence J.

in s. 1 of that Act was satisfied in this case. The justices have ignored them, and come to the conclusion that in the particular circumstances it was inexpedient to inflict punishment. They had to determine whether the appellant was really guilty of a grave offence and they proceeded to say that the appellant must be deemed to be enlisted. That surely is a determination of the gravest import to this man's life, and to say that, because they have chosen to add "we dismissed the information," no appeal lies, seems to me to look at the mere husk and omit to regard the actual substance of what has been done. It was within the powers of the justices, under s. 33 of the Summary Jurisdiction Act, 1879, to state a case, and they have done so quite properly, because the question whether this man is or is not subject to the Military Service Acts is a matter which should have been determined. If they thought he was subject to the Military Service Acts they should have convicted him, and they were wrong in trying to escape from this by applying the Probation of Offenders Act, 1907. I therefore think the appeal can be heard.

AVORY J. In my opinion this appellant has clearly a right of appeal to this Court by way of case stated under s. 33 of the Summary Jurisdiction Act, 1879. In fact the record upon its face shows him to be a person who has been convicted, because it states that the offence charged was proved against him. In those circumstances it cannot be doubted that he was a person aggrieved within the meaning of s. 33 who desired to question the determination or other proceeding of the Court of summary jurisdiction, either on the ground that it was erroneous in point of law or as being in excess of jurisdiction. In this particular case the order made under the Probation of Offenders Act, 1907, was erroneous in point of law or in excess of jurisdiction in the sense that the case was one to which it was erroneous to apply that Act. This Court decided in *Phillips* v. *Evans* (1) that keeping a

(1) [1896] 1 Q. B. 305.

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dog without a licence is not an offence of a trivial nature within the meaning of the similar provision of the Summary Jurisdiction Act, 1879. It is impossible for anyone to suppose that the offence of being an absentee or a deserter from the Army is an offence of a trivial nature which can be dealt with under the Probation of Offenders Act, 1907. The determination of the justices was a judgment in rem and therefore could be pleaded as res judicata in any subsequent proceeding. It was a judgment in rem because it was a determination of the appellant's status. It determined that he was a person enlisted in the Army and a member of the reserve forces. If any authority is required to show that this was a judgment in rem it will be found in *Wakefield Corporation* v. *Cooke* (1), where the question was whether a decision of justices that a street was a highway repairable by the inhabitants at large was a judgment in rem, and the House of Lords held that it was. In the argument the following definition or description of a judgment in rem was cited from Smith's Leading Cases, 1st ed., vol. 2, p. 439; 12th ed., vol. 2, p. 776: "A judgment in rem [is] an adjudication pronounced (as indeed its name denotes) upon the status of some particular subject-matter, by a tribunal having competent authority for that purpose. Such an adjudication, being a most solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, concludes all persons from saying that the status of the thing adjudicated upon was not such as declared by the adjudication." The adjudication as to the status of a person may, equally with the adjudication as to the status of any other subject-matter, be a judgment in rem. That being so, there is here a determination as to the status of the appellant, and I have no doubt a "determination" within s. 33 of the Summary Jurisdiction Act, 1879.

As, however, this Court has been specially constituted, not so much for the purpose of deciding the point arising in this particular case but because of the general importance of this question as applying to decisions under the Probation

(1) [1904] A. C. 31.

of Offenders Act, 1907, I think it advisable to add a word upon the general principle, apart from the facts of this particular case. It is in my opinion the duty of the Court, if possible, to make sense of the words of a statute rather than to make nonsense of them. Sect. 1, sub-s. 1, of the Probation of Offenders Act, 1907, may be made sensible by reading the words "the Court may, without proceeding to conviction" as meaning "the Court may, without proceeding to record the conviction." I have no doubt that that was what was intended by the Legislature. The words, if taken literally, may be illogical, but the word "conviction" has different meanings. Sometimes it means an adjudication that a person has committed the offence charged against him; sometimes it means that, plus the judgment of the Court upon it. In s. 1, sub-s. 1, I have no doubt the word is used in the second of these senses, namely, an adjudication that an offence has been committed plus the judgment. The sub-section therefore means to enact that although the offence is proved the justices, without proceeding to record any punishment or judgment upon it, may dismiss the information. Where that is done the accused is, or may be, aggrieved, and is entitled to ask for a case to be stated. A person may be charged with an offence and it may be of vital importance that he should clear his character of any imputation cast upon it by a finding that the offence has been proved against him. The Probation of Offenders Act, 1907, empowers the justices to have regard to the character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, etc. Suppose a man in a responsible position were charged with an assault upon a girl, and suppose that he was a man of excellent character till that time, and suppose that the assault was of a trivial nature, the justices might find the charge proved and yet proceed under the Probation of Offenders Act, 1907. In such a case the accused would have a right to challenge the justices' determination by appealing by way of case stated. For these reasons I agree that this appeal lies.

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LUSH J. I agree with the judgment delivered by Darling J. In s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, the Legislature I think intended that where the justices thought that the nature of the offence was so trivial—I take that one of the conditions named in the section—that it did not deserve punishment, then, although they might think the charge proved, they might abstain from convicting and make an order dismissing the information; in other words, that it should not be necessary for the justices to come to any determination upon the merits but simply dismiss the information or charge. The section has been acted upon in a different way. Justices are in the habit of coming to a determination upon the question whether the offence is proved, and then, if they think that it is trivial, their order is in form a dismissal of the information. It may be that in empowering justices to make that order the section deals with the form of the record and not with the substance or merits of the case. In this case the justices have entirely misapplied the section. A. T. Lawrence J. has said that this appellant has been neither convicted nor acquitted. I should prefer to say that he has been both convicted and acquitted. Upon the merits of the case the justices have convicted him. I can see no difference between saying "offence proved" and saying "we convict of the offence." So far, however, as the form is concerned, they have acquitted him. This is highly illogical. When I ask myself whether there has been a "determination" against the appellant I must answer in the affirmative. The justices have found that the appellant has committed the offence charged in the information. Serious consequences follow from that determination; nothing follows from the form of the record. The determination of fact not only exposes this man to obloquy; it makes him liable under the Military Service Acts. It is said by Mr. Branson that there is no right of appeal because there is only one determination, one dismissing the information. I do not agree. The real substantial determination is that the appellant is guilty, and inasmuch as the Summary Jurisdiction Act, 1879, gives

a person aggrieved the right to appeal against a determination against him this appellant has a right to appeal.

[The appeal on the merits was then heard by the Court as originally constituted, and was dismissed on the ground that there was evidence upon which the justices were entitled to come to the conclusion that the appellant was not "a regular minister of any religious denomination."]

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Appeal dismissed.

Solicitors for appellant: *Upton, Britton & Lumb, for Wilmshurst & Stones, Huddersfield.*

Solicitor for respondent: *Treasury Solicitor.*

J. S. H.

HARRIS, APPELLANT *v.* LUCAS, RESPONDENT.

1919. *May* 12.

Wild Birds — Live Goldfinches recently taken — Prohibition against "killing or taking" Goldfinches in County of London—Possession of Goldfinches lawfully taken in another County—Wild Birds Protection Act, 1880 (43 *&* 44 *Vict. c.* 35), *ss.* 3, 8—*Wild Birds Protection (Administrative County of London) Order,* 1909, *art.* 4.

By virtue of s. 3 of the Wild Birds Protection Act, 1880, an Order made by a Secretary of State under s. 8 of the Act applicable to the County of London, and decisions thereon, it is made an offence for a person to have in his possession or control in the County of London at any time of the year wild birds recently taken, including goldfinches, though they may have been taken in a place where it was lawful to take them.

Certain wild birds, namely, goldfinches, were in the control or possession of a bird dealer in the County of London on January 15, 1919. The birds had been taken in Ireland, on December 3, 1918, when and where it was lawful to take them. They were sent to London by post about January 8, 1919, the journey taking about a week. They could not be sent earlier owing to their wild state, otherwise they would have run a risk of dying or injuring themselves on the journey. The birds, when they arrived on January 15, had a wild and terrified appearance:—

Held, that in deciding whether or not the birds were recently taken, the magistrate was entitled to take into consideration not only the interval between the time when the birds were taken and when they came into the defendant's possession, but also all the circumstances of the case, including the condition of the birds when they came into the defendant's possession, and the fact that they had to be kept some time in Ireland in order to be able to endure the journey, and also the length of the journey.

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CASE stated by a Metropolitan police magistrate.

A complaint was made by the respondent, John Lucas, under the Wild Birds Protection Acts, 1880 to 1908, and the Wild Birds Protection (Administrative County of London) Order, 1909 (1), against the appellant, Charles Harris, for that he on January 15, 1919, did knowingly and wilfully

(1) Wild Birds Protection Act, 1880 (43 & 44 Vict. c. 35), s. 3: "Any person who between the first day of March and the first day of August in any year after the passing of this Act shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession after the fifteenth day of March, any wild bird recently killed or taken, shall, on conviction of any such offence before any two justices of the peace . . . . in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect of which an offence has been committed a sum not exceeding one pound, and, in the case of any other wild bird, shall for a first offence be reprimanded and discharged on payment of costs, and for every subsequent offence forfeit and pay for every such wild bird in respect of which an offence is committed a sum of money not exceeding five shillings, in addition to the costs, unless such person shall prove that the said wild bird was either killed or taken or bought or received during the period in which such wild bird could be legally killed or taken, or from some person residing out of the United Kingdom. . . . ."

Sect. 8 gives power to a Secretary of State, upon the application of the justices in quarter sessions of any county (now, by s. 3, sub s. (xiii.), of the Local Government Act, 1888, the County Council), by order to "extend or vary the time during which the killing and taking of wild birds or any of them is prohibited by this Act; after the making of which order the penalties imposed by this Act in respect of such wild birds shall in such county apply only to offences committed during the time specified in such order."

The Schedule to the Act included goldfinches.

The Wild Birds Protection Act, 1881 (44 & 45 Vict. c. 51), by s. 1 repeals the above exception in s. 3 of the Act of 1880 (from the word "unless" down to the words "United Kingdom"), and in lieu thereof the following enactment is to have effect: "A person shall not be liable to be convicted under s. 3 of the Wild Birds Protection Act, 1880, of exposing or offering for sale, or having the control or possession of, any wild bird recently killed, if he satisfies the Court before whom he is charged either (1.) that the killing of such wild bird, if in a place to which the said Act extends, was lawful at the time when and by the person by whom it was killed; or (2.) that the wild bird was killed in some place to which the said Act does not extend, and the fact that the wild bird was imported from some place to which the said Act does not extend

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have in his possession certain wild birds, to wit, twenty-one goldfinches, recently taken.

The appellant was a bird dealer carrying on business in Bethnal Green Road, in the County of London. On January 15, 1919, he had in his possession certain wild birds, to wit, twenty-one goldfinches, which were sent by him later to the Army and Navy Stores, Ld., for exhibition and sale. The birds had arrived the same day in a box or cage by post from Fethard, co. Tipperary, Ireland, where they had been taken on or immediately before December 3, 1918. They presented to the respondent a wild and terrified appearance when seen by him on January 15, 1919. Had the birds been sent to London immediately they were taken they would not have arrived in as good condition for exhibition, and owing to their wild state would have run a risk of dying or injuring themselves on the journey, which occupied about a week. The appellant informed the respondent that he received similar consignments of birds from Ireland at regular intervals.

On the part of the appellant it was contended that "wild birds recently taken" could not include birds taken as long as six weeks.

On the part of the respondent it was contended that in judging whether birds were recently taken the magistrate must consider all the circumstances of the case, and that in the circumstances of this case birds that had been taken six weeks were, nevertheless, recently taken.

The magistrate, being of opinion that it was a question of fact whether the birds were recently taken, and that he

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shall, until the contrary is proved, be evidence that the bird was killed in some place to which the said Act does not extend."

The Wild Birds Protection Administrative County of London Order, 1909, art. 2: "The time during which the killing or taking of wild birds is prohibited by the Act of 1880 shall be extended, so far as concerns the administrative County of London, so as to be between the 31st day of January and the 1st day of September in any year."

Art. 4: "During the period between the 31st day of August in any year and the 1st day of February following the killing or taking of any of the following species of wild birds is prohibited throughout the administrative County of London." Then follows a list of birds, including the goldfinch.

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must take into consideration the length of journey from Tipperary to London, the wildness of goldfinches when first caught and placed in a cage, and the necessity for waiting for some time before sending them to London, so that they would be likely to arrive alive and in fair condition, held that the birds were "recently taken," and that the charge was proved; but taking into consideration the fact that the appellant believed he was acting in accordance with the law in having the birds in his possession, he dismissed the charge under the Probation of Offenders Act, 1907, and ordered the appellant to pay the costs.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct decision in point of law.

Lewis Thomas K.C. and *Blanco White* for the appellant. Under s. 3 of the Wild Birds Protection Act, 1880, it was made an offence to kill or take a wild bird between March 1 and August 1 in any year, and also for a person to have in his possession after March 15 a wild bird recently taken. The Secretary of State, under the powers conferred upon him by s. 8 of that Act to vary or extend the time during which the killing or taking of wild birds is prohibited, has made an Order under which the killing or taking of certain wild birds, including goldfinches, is prohibited in the County of London all the year round. There is, however, nothing in that Order making it an offence for a person to have in his possession in London a wild bird recently taken if it could lawfully be taken at the place where it was taken. It was, however, held in *Flower* v. *Watts* (1) that the words "killing and taking" in s. 8 of the Act of 1880 included all the offences specified in s. 3, and that therefore it was an offence for a person to have in his possession or control in the County of London at any time of the year wild birds recently taken, though they may have been taken in a place where it was lawful to take them. A penal section which is not in a statute ought not to be inferentially read into it. In any event

(1) [1910] 2 K. B. 327.

that case can be distinguished from the present case on its facts as there was a finding in that case that the larks had been freshly caught in Cambridgeshire. These goldfinches, on the other hand, were lawfully taken in Tipperary, Ireland, on December 3. They were sent to London on January 8, and arrived on January 15, when they had been in captivity forty-three days. The magistrate in arriving at his decision that the birds were recently taken took into consideration facts which were not relevant to his decision, namely, the length of the journey and the period which had to elapse before the birds could make the journey in safety. The only thing that ought to be considered in deciding whether or not a wild bird is recently taken is the length of time between the date when the bird was taken and the date when it was in the possession of the person charged. Bray J. in *Rex* v. *Hopkins* (1) said that he would be "very slow to find that any bird which had been taken fourteen days was recently taken." The fact that the Wild Birds Protection Act, 1880, made it an offence to kill or take wild birds after March 1, but only made it an offence to have in possession after March 15 wild birds recently taken, is some ground for saying that the Legislature intended fourteen days to be the period within which a wild bird was to be considered as recently taken. In *Hollis* v. *Young* (2) it was held that the fact that the wild birds were young and very wild, beating themselves against the cage, and that their feathers were of a light colour, was some evidence that the birds were recently taken. In *Green* v. *Carstang* (3) it was held that a wild bird is not of necessity not recently taken because it has been in the possession of a person for a period of three weeks; but there was no decision as to what amounts to "recently taken."

J. N. Buchanan (*Stuart Bevan K.C.* with him) for the respondent. It is necessary to bear in mind the object with which the Act was passed, namely, for the protection of wild birds. That protection was increased by the subsequent Order. The intention was to check the sale of live wild birds.

(1) (1911) 104 L. T. 917, 919. (2) [1909] 1 K. B. 629.
(3) (1901) 85 L. T. 615.

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If wild birds have been recently taken it is clear from the decision in *Flower* v. *Watts* (1) that a person who has them in his possession in the County of London commits an offence. If the question whether or not a wild bird is recently taken depends, as the appellant contends, solely upon the length of time between the capture of the birds and when they are found in possession, the period of time within which a wild bird would be considered to be recently taken must be a constant period for all wild birds. If that had been intended by the Legislature it would have been so provided by the Act. The true view is that it was intended that the question whether or not a wild bird is recently taken should depend upon the circumstances of each particular case, and not upon any fixed period of time. The Act of 1880 applies to wild birds taken abroad, but in the possession of persons in this country; it must therefore have been contemplated that the time occupied by the journey to this country would be within the limits of the term "recently taken." Not only can the time occupied on the journey be taken into consideration but also such matters as the nature of the birds; the fact that they would have to be in captivity a certain length of time in order that they might arrive at their destination alive, and also their state on arrival. The case finds that these birds on their arrival had a wild appearance and that they were terrified. The fourteen days between March 1 and 15 must not be taken to be the meaning of the term "recently taken." It was held in *Green* v. *Carstang* (2) that a wild bird that has been in possession for a period of three weeks was not necessarily therefore not recently taken. Here also the birds are not necessarily not recently taken because they had been in captivity for a period of six weeks. The magistrate was entitled to take into consideration all the circumstances of the case, including the appearance of the birds, and to find that they were recently taken.

Lewis Thomas K.C. replied.

DARLING J. The facts in this case are that on January 15,

(1) [1910] 2 K. B. 327. (2) (1901) 85 L. T. 615.

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1919, a bird dealer in London had in his possession some goldfinches which had arrived on that day in a cage from the County of Tipperary, and which had been taken on, or just before, December 3, 1918. He was proceeded against under s. 3 of the Wild Birds Protection Act, 1880, which makes it an offence for a person to have in his control or possession after March 15 in any year any wild bird recently killed or taken. The Home Secretary has by an Order, which he has power under s. 8 of that Act to make, prohibited the killing or taking of wild birds within the County of London during the whole of the year. The question in this case is whether these goldfinches were recently taken. For some time I was inclined to think that they were not recently taken, and I still think that using the English language in its ordinary sense they were not recently taken. The word "recently," used in its ordinary sense, means within a short time. One cannot say that "recently" means within a week or a month; whether or not what happens is recent depends upon the nature of the act. In my opinion, however, it is impossible to construe this statute according to the ordinary use of the English language. But, fortunately for us, this Court, when differently constituted, construed this statute in *Flower* v. *Watts* (1) in a way which makes it possible to uphold the decision of the magistrate. It is true that Lord Alverstone C.J. put the construction upon the statute, and that Channell J., although he agreed with the meaning placed upon the language of the statute by Lord Alverstone, said that he should not have been able to do it himself. Lord Coleridge J. simply said, "I agree." Whether he agreed with the Chief Justice or agreed with the Chief Justice and also with Channell J.'s remark we do not know. The decision of the Court, however, is binding upon us.

It seems to me that the intention of the Legislature was to make the offence depend upon whether the person had in his possession a wild bird or a tame bird, and accordingly the words "recently taken" were used. In their ordinary sense that would mean "recently captured," and all one would

(1) [1910] 2 K. B. 327.

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have to do would be to find out how long the wild bird had been taken. If it was a year since the bird was taken it would or ought to have become tame, and it would not be possible to say that it was recently taken. If, on the other hand, it was taken the day before yesterday, it would of course have been recently taken. The statute does not say how many days or weeks or months a wild bird must be taken before it ceases to be recently taken, nor does it say when a bird is to be called a tame bird and when it is to be called a wild bird. Nevertheless it was in my opinion intended to punish persons who exposed wild birds, not tame birds, for sale, or had such birds in their control or possession, and therefore it is necessary to look not only at the time when the bird was captured but also at its condition when it was exposed for sale or came into the possession of the person charged, in order to find out whether or not it had ceased to be a wild bird. The magistrate was therefore justified in considering the nature of the birds. He found as a fact that these birds were not tame birds. They had been kept in Ireland some time after they were caught, because if they had been sent to London earlier they would have injured themselves during the journey. They could not have been brought alive if they had been shipped off at once. They were kept, therefore, not until they were tame birds, but until they were just so far removed from absolute natural birds as to be capable of enduring the journey and of arriving alive and in a fair condition. I think therefore he was justified in coming to the conclusion that they were "recently taken" within the sense in which those words are used in this Act of Parliament, although they are there used, as I have already said, in a sense in which they would not be used anywhere else.

AVORY J. I am of the same opinion. The main purpose of the Wild Birds Protection Act, 1880, was to prevent the destruction of wild birds during the close season, and in order to carry out that purpose the statute, in addition to prohibiting the killing or shooting of wild birds, prohibited any person

from having in his possession after March 15 any wild birds recently taken. The statute provided a defence to any person if he could show that he bought or received the birds from a person residing out of the United Kingdom. I think that meant that a defence was given to a person who bought the wild birds from a person who had the birds in some place out of the United Kingdom, and therefore the Act contemplated the birds being brought from abroad. But the Wild Birds Protection Act of 1881 (44 & 45 Vict. c. 51) has absolutely repealed that proviso, and has taken away that defence from the person who is charged with having wild birds in his possession; it has provided a defence for persons who are in possession of wild birds recently killed, but it does not provide a defence for persons in possession of wild birds recently taken. As the statute clearly contemplates wild birds being received in the United Kingdom although taken abroad, and the present case establishes that these birds were taken in Ireland and transported to London, where the appellant received them, it is in my opinion clear beyond doubt that the time that was in fact occupied by the journey from Ireland to London may be taken into consideration, and that the birds may still be described as "recently taken" notwithstanding that time has been occupied in the journey. Otherwise the absurd result would follow that no birds taken in Ireland could ever be the subject of a prosecution when a person is alleged to have them in his possession in London. For some time I was troubled by the suggestion, there is no actual finding in the special case to that effect, that the birds had been kept in Ireland sufficiently long to reduce them from their wild to a tame condition, and if that had been the fact I should have been of opinion that another answer to this case might have been put forward, namely, that the birds were not wild birds in the possession of the appellant. On looking at the case more closely however I think that is a wrong inference to draw from the magistrate's finding. What he really finds is, that had the birds been sent to London immediately they were taken they would, owing to their wild state, have run the risk of dying or injuring

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themselves on the journey. He was of opinion that the necessity of waiting for some time before sending them to London, so that they would be likely to arrive alive, was a matter that he could properly take into consideration. In my opinion the magistrate was right in taking that matter into consideration. If it is to be an offence for a person to receive or be in possession in London of wild birds which have been taken in Ireland, then it seems to me that the time that is necessarily occupied in the journey and also the time that is necessarily occupied in waiting so as to ensure that the birds will arrive alive in London, can reasonably be taken into account in deciding as a question of fact whether those birds have been "recently taken" within the meaning of the Act. For these reasons I think it was competent to the magistrates to find as a matter of fact that these birds were "recently taken." It is not for us to say whether or not we should have arrived at the same conclusion as a matter of fact. The appeal must therefore be dismissed.

SALTER J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *Harry F. Strouts.*
Solicitor for respondent: *S. G. Polhill.*

R. F. S.

ARTIZANS, LABOURERS AND GENERAL DWELLINGS COMPANY, LIMITED *v.* WHITAKER.

1919. *May* 16, 22.

[1918 A. 1031.]

Emergency Legislation—Landlord and Tenant—Recovery of Possession—Satisfactory Ground—Notice to quit by Tenant—Notice intended to be Provisional—Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915 (5 & 6 *Geo.* 5, *c.* 97), *s.* 1, *sub-s.* 3; *s.* 2; *Increase of Rent and Mortgage Interest (Restrictions) Act*, 1919 (9 *Geo.* 5, *c.* 7), *s.* 4.

The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, s. 1, sub-s. 3, which apart from some satisfactory ground prevents a landlord recovering possession of a dwelling house below a certain rental so long as the tenant pays the rent and performs the conditions of the tenancy, applies to the case where a tenant terminates his own tenancy.

In such a case the usual condition as to giving possession on the termination of the tenancy is otiose.

A quarterly tenant gave a quarter's notice to quit, believing that under his parol agreement the notice was provisional and inoperative unless confirmed by the half-quarter day. Wishing to remain, he did not confirm the notice:—

Held, on the actual agreement proved, that the notice to quit was in fact inoperative, but

Held, also, that if it had been operative, the tenant's belief that it was only provisional would have prevented it being a satisfactory ground for ordering possession.

Witness Action.

By a lease dated December 22, 1909, the plaintiffs let a dwelling-house at Tulse Hill to the defendant for three years from December 25, 1909, and thenceforward from year to year determinable by six months' notice expiring at the end of the third or any subsequent year at a rent of 46*l.*, payable quarterly, the last payment of rent to be made in advance on the quarter day immediately preceding the determination of the tenancy by effluxion of time or otherwise. The defendant covenanted (inter alia) to give up the premises to the plaintiffs at the expiration of the tenancy.

Early in December, 1913, the defendant, who had determined the lease at Christmas, verbally agreed with the plaintiffs to continue as quarterly tenant on the terms and

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conditions of the lease, the tenancy being determinable by a quarter's notice from either side, expiring on the usual quarter days except Christmas.

The defendant alleged, but the plaintiffs denied, that it was also agreed that the defendant's notice to quit should be inoperative unless confirmed by the half quarter day.

Acting on his own view of the agreement the defendant gave notices every quarter day except Michaelmas, but with one exception, of which the plaintiffs did not take advantage, he did not confirm them.

On June 24, 1918, the defendant, who had paid his rent up to that date, gave notice to quit at Michaelmas, and enclosed a quarter's rent in advance. This notice was not confirmed by the half quarter day, but the plaintiffs who, as already stated, denied this part of the agreement, treated the notice as determining the tenancy, and required possession under a penalty of double rent in default.

The defendant did not give up possession, and on December 11, 1918, the plaintiffs commenced this action for possession and mesne profits.

On December 24, 1918, the defendant gave his usual precautionary notice to quit, and tendered the Christmas rent and a quarter's rent in advance. The notice and tender were refused.

The defendant relied on two points: First, he alleged that there was no binding notice to quit, so that his tenancy was still subsisting. Secondly, if the notice to quit was in fact binding, he relied on the Increase of Rent and Mortgage Interest (War Restrictions) Acts, 1915 and 1919. (1)

(1) The Increase of Rent and Mortgage Interest (War Restrictions) Act, 1915, passed on December 23, 1915, provides as follows:

Sect. 1, sub-s. 3: "No order for the recovery of possession of a dwelling-house to which this Act applies or for the ejectment of a tenant therefrom shall be made so long as the tenant continues to pay the rent at the agreed rate as modified by this Act and performs the other conditions of the tenancy, except on the ground that the tenant has committed waste or has been guilty of conduct which is a nuisance or an annoyance to adjoining or neighbouring occupiers, or that the premises are reasonably required by the landlord for the occupation of himself or some other person in his employ, or in the employ of some tenant from him, or on some other ground which may be

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The defendant succeeded on both points. The second point is alone reported.

Hawke K.C. and *F. A. Hinde* for the plaintiffs. If the notice to quit was in fact binding, the defendant relies on the Acts of 1915 and 1919. His amount of rental is now within the 1915 Act, and we cannot rely on the fact that it has only become so since the writ was issued: *Harcourt* v. *Lowe*. (1) But by terminating his own tenancy he has taken the case altogether outside the Act. At all events that is a satisfactory ground for giving possession. He has not in fact complied with the express condition as to giving possession. We are at least entitled to an order for possession and mesne profits with the remedy suspended till the Acts run out at Lady Day, 1921. *Colam K.C.* and *Van Den Berg* for the defendant. The statute applies no matter by whom the tenancy is terminated, and the condition as to giving possession is otiose. In the present case however the defendant did not intend to terminate his tenancy. Assuming that he mistook his rights in thinking he could give a precautionary notice to quit, his intention to continue his tenancy prevents that notice, even if binding, being a satisfactory ground for ordering possession.

Hawke K.C. in reply.

Cur. adv. vult.

May 22 ASTBURY J., after stating the facts, and holding on the evidence that the defendant's version of the parol contract was correct, and that his notice to quit, not having been confirmed by the half quarter day, was inoperative, continued: On the first point, therefore, I decide in favour of the defendant, and hold that his tenancy did not determine last Michaelmas. If I am right, it is not necessary to deal with the statutory defence, but as it has been fully argued I will state shortly

deemed satisfactory by the Court making such order. . . . ."

By s. 2 this Act did not apply to a house in the Metropolitan police district rented at over 35*l.*, but by the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, s. 4, passed on April 2, 1919, the rent limit was raised to 70*l.*

(1) [1919] Current Digest, 48; 35 Times L. R. 255.

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Astbury J.

my conclusions upon it. If the defendant's story was incorrect his notice to quit was binding ab initio, and he was at the date of the writ, and still is, a tenant at sufferance, and was so recognized by the plaintiffs when the demand for double rent—though unenforceable—was made against him. As such he was, I think, a "tenant" within s. 1, sub-s. 3, of the 1915 Act, and except in the cases therein referred to no order for recovery of possession can be made against him so long as he continues to pay rent at the agreed rate, and so long as he performs the other conditions of the tenancy. He has paid his rent and performed the other conditions except the condition for giving possession at the expiration of the tenancy. That condition raises a difficulty, but it is clear that, if the landlord had given notice, and the tenant had refused to give possession in compliance with this condition, the Act would have applied. Otherwise the section would be more or less a nullity. I do not think I am at liberty to read the section differently where the tenancy has expired by the tenant's act. It may seem whimsical that an Act passed for the relief of tenants should apply when the tenant has himself put an end to the tenancy; but the language admits of no other construction.

In *Harcourt* v. *Lowe* (1) Lush J. held that the section must be considered at the date when the order is asked for at the hearing, as distinct from the date of the writ. This being so the Act would apply even if the defendant were wrong on his first point, unless excluded on some ground satisfactory to the Court. As the defendant, rightly or wrongly, did not intend in this case to give other than a provisional notice in June, 1918, I do not think any such ground exists.

The result is that the plaintiffs fail, and there must be judgment for the defendant with costs.

Solicitors: *Mann & Co.; J. R. Cardew Smith.*

(1) [1919] Current Digest, 48; 35 Times L. R. 255.

G. R. A.

[IN THE COURT OF APPEAL.]

C. A.
1919.
March 19, 20.

ITALIAN STATE RAILWAYS *v.* MAVROGORDATOS AND ANOTHER.

[1917 I. 139.]

Ship—Charterparty—Hire payable in Advance—Default in Payment—Withdrawal of Ship—Redelivery—Apportionment of Freight.

By a time charterparty the use of a ship and her master and crew were placed at the disposal of the charterers for twelve months from a certain date. The charterers agreed to pay hire monthly in advance commencing on the day of the vessel's "delivery as aforesaid" and continuing until "her redelivery" at a port in West Italy or the United Kingdom at the charterers' option. Failing punctual and regular payment of the hire the owner had liberty to withdraw the vessel from the service of the charterers without prejudice to any claim he might otherwise have against them.

On January 10, 1917, a month's hire fell due and was not paid. On the following day, while the ship was on her way to Barry under the charterers' orders, the owner wrote to the charterers withdrawing her from their service. The ship arrived at Barry on January 23.

In an action by the charterers against the owner for a declaration that the charterparty was still subsisting, the owner counterclaimed for hire of the ship from January 11 to January 23 when, as he contended, the ship was first redelivered to him:—

Held, that the charterparty not being a demise of the ship but a contract for the hire of services, the word "redelivery" could not be construed literally; that the ship was redelivered when the owner was enabled to resume control of her; and that the owner by withdrawing the ship from the service of the charterers on January 11 had prevented any further action by them in the way of redelivering her after that date.

And, the owner admitting that he could only recover hire for that part of a month during which the ship was at the service of the charterers,

Held, that he could not recover hire for the use of the ship after January 11.

APPEAL from the judgment of Sankey J.

By a charterparty made in London on January 21, 1916, A. M. Mavrogordatos, owner of the Greek steamer *Antonios M. Mavrogordatos* guaranteed of 6450 tons total summer dead weight capacity inclusive of bunkers, agreed to let, and the State Railways of the Italian Government agreed to hire the steamer for twelve months commencing from the

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expiration of a former charter dated March 25, 1915, she being then tight staunch and strong and in every way fitted for the service and being maintained by the owner with a full complement of officers, seamen, engineers, and firemen, to be employed in such lawful trades between such safe ports always afloat in the United Kingdom and other specified areas as the charterers or their agents should direct.

The charterparty contained clauses to the following effect:—

2. The owners were to provide and pay for all provisions and wages of the captain, officers, engineers, firemen, and crew, and to pay for the insurance on the vessel and for all oil tallow and waste required for the engine room and to provide and pay for the proper and efficient working of the steamer:

3. The charterers were to provide and pay for all coal, fuel, port charges, pilotages, agencies, and all other charges and expenses whatsoever except those before stated:

5. The charterers were to pay for the use and hire of the vessel at the rate of 28*s.* on her guaranteed summer dead weight as above per calendar month "commencing on the day of her delivery as aforesaid," and at the same rate for any part of a month; the hire to continue from the time specified for commencing the charter "until her redelivery within the limits and time mentioned above for delivery to owners in the same good order and condition as when accepted fair wear and tear excepted at a port in West Italy or in the United Kingdom at charterers' option:"

6. Payment was to be made as follows:—In cash monthly in advance at the National Provincial Bank, Cardiff, to the Anglo-Levant Shipping Company, Limited, or their nominees, and, failing the punctual and regular payment of the hire or any breach of the charterparty, the owner was to be at liberty "to withdraw the vessel from the service of the charterers without prejudice to any claim they the owners may otherwise have on the charterers in pursuance of this charter:"

9. The captain although appointed by the owner was to follow the instructions of the charterers who were to furnish

him from time to time with the necessary sailing directions and he was to keep a full and correct log to be exhibited to the charterers or their agents when required:

10. The captain was to sign bills of lading at any rate of freight the charterers or their agents might choose without prejudice to the stipulations of the charterparty, the charterers agreeing to indemnify the owner from any consequences that might arise from the captain's signature to the bills of lading or his otherwise following the charterer's instructions.

The charterparty contained the usual exceptions of act of God, perils of the sea, fire, arrests and restraint of princes, etc.

On May 10, 1916, the vessel being then at the port of Genoa was placed at the disposal of the charterers, and on the following day the first monthly payment of hire, 8879*l.* 10*s.*, was made. On May 17 after she had been for 8½ days on hire she was requisitioned by the Greek Government. It was thereupon agreed between the parties, by correspondence in August and September, 1916, that the hire of the vessel should be suspended during the time she was under requisition, the owner admitting that he held 1325*l.* 15*s.* 7*d.* to the credit of the second month's hire, which sum however was not admitted by the charterers.

One of the points in dispute was when the requisition ceased. The Court, agreeing with Sankey J., held that it ceased on December 18, 1916, the vessel having been on that day released to the charterers at the port of Algiers. The charterers ordered her to Barry in South Wales. A month's hire payable in advance under the charterparty fell due at the latest on January 10, 1917, that is to say 22½ days from the time when the vessel was released to the charterers by the Greek Government; but by some mistake on the part of the charterers, who asserted cross-claims amounting to or exceeding the sum due for hire, it was not paid on that day. Thereupon the Anglo-Levant Steamship Co. as agents for the owner wrote to the charterers as follows:—"January 11, 1917, Messrs. The Italian State Railways, Cardiff. Dear Sirs. s.s. *Antonios*. We are instructed by the owner of the vessel to give you notice that in consequence of your failure to pay freight in

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advance in the terms of the charter, the charterparty dated January 21, 1916, is hereby cancelled."

When this notice reached the charterers' agents at Cardiff the ship was in Lisbon harbour on her way to Barry, where she arrived on January 23, 1917.

The charterers brought an action against the captain and the owner of the vessel claiming a declaration that the charterparty was still subsisting. The claim was heard before Sankey J. who on February 15, 1917, gave judgment for the defendants.

The shipowner counterclaimed, amongst other items, for a sum of 7160*l.* 16*s.* 4*d.* in respect of hire due on January 10. From this the charterers claimed to deduct a sum of 3437*l.* 13*s.* 3*d.*, in respect of hire of the vessel from Lisbon to Barry. The counterclaim was heard on December 20, 1918. Sankey J. held that the owner had cancelled the charterparty by the letter of January 11, 1917, and that consequently the charterers were not liable to pay this hire.

The owner appealed.

Leck K.C. and *R. A. Wright K.C.* for the appellant. The learned judge was wrong in holding that the letter of January 11, 1917, was a cancellation of the charterparty. It was a withdrawal of the ship under the terms of the charterparty and was "without prejudice to any claim" the owner might "otherwise have on the charterers." One claim the owner had was to have his ship redelivered to him at a port in the United Kingdom or West Italy. The hire was to continue until this was done. It could not be done until the ship reached Barry. While a ship is on a voyage ordered by the charterer, perhaps carrying the charterer's cargo, she cannot be redelivered to the owner or put at the owner's disposal. The so called cancellation can only mean that after the ship has performed her present engagements she must be delivered to the owner at one of the ports named for redelivery in the charterparty. It follows that the respondents must pay hire up to January 23, when the ship reached Barry, either under the charterparty or as damages for not paying the month's hire promptly on January 10.

Another claim which the owner had against the charterers was a vested right on January 10 to a month's hire or to an apportioned part thereof if he should take possession of his ship before the end of the month : *Wehner* v. *Dene Steam Shipping Co.* (1) He cannot be said to have taken possession of his ship while she was on the charterers' business as she was until she reached Barry. Nothing ever happened to divest this right. The withdrawal of the ship on January 11 was without prejudice thereto.

MacKinnon K.C. and *A. Neilson* for the respondents. Confusion is caused in a case like this by the use of such expressions as " delivery " and " redelivery " of the ship. Those phrases are relics of the time when a charterparty was a demise of the ship. At the present day a charterparty is a contract for services to be rendered by a shipowner to the charterer. The charterparty in this case is a typical example of a contract for the service of a ship, master, and crew. In certain events the owner may discontinue the services. If one of these events happens, the fact that the ship is on the high seas does not prevent the owner from discontinuing the services. If the ship is carrying cargo when the owner elects to discontinue he may be bound to perform the contract made by the charterer with the owner of the goods, just as a landlord accepting a surrender of a lease is bound by a sub-lease made by the lessee, the contract having been made by the charterer with the shipowner's authority. But as between the owner and the charterer the owner is not bound to continue rendering services to the charterer until the ship reaches a port named for " redelivery," as it is loosely called. The obligation to " redeliver " at a certain port is imposed on the charterer for the benefit of the owner. If the charterer commits such a breach of the charterparty as may lead to the forfeiture of his rights under it, he cannot insist on having the services of the ship until he " redelivers " her under the charterparty. The shipowner may there and then withdraw the ship from the charterer's service, as he did in this case by the letter of January 11. But then he cannot have hire for the use of the ship after the date of withdrawal. [They were stopped.]

(1) [1905] 2 K. B. 92.

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Leck K.C. in reply.

BANKES L.J. This vessel sailed from Algiers on December 18, 1917, under the time charterers' orders, on a voyage to Barry. She put in at Gibraltar and Lisbon, but that is immaterial; I treat her as having started on a voyage from Algiers to Barry. While she was on this voyage the day arrived on which a month's hire was payable in advance under the charterparty. That day was, according to Sankey J., January 9 at 10 P.M., or, according to the charterers, January 10. Whichever date is correct the month's hire was not paid. It is not material to consider the motive of the shipowner; it suited his purpose to do what he did. He gave notice in writing to the charterers dated January 11, 1917, in these words:— "The charterparty dated January 21, 1916, is hereby cancelled." It would have been more correct to say that the ship was withdrawn from the charterers' service, but his actual words were as I have stated. That notice would have reached the charterers' representatives at Cardiff a day or two after January 11. The ship was then in Lisbon harbour, but neither of the parties knew this. I treat her as being upon the high seas. The master receiving no further instructions, continued the voyage begun under the charterers' orders, and arrived at Barry on January 23. The main contention of the shipowner was that the ship was not redelivered to him by the charterers till she arrived at Barry. That is a question of general importance.

Another point was taken, which has no real bearing on the correctness of the judgment under appeal. That point was that the shipowner had a vested cause of action for the whole month's hire in advance immediately on the expiration of January 10, and could maintain an action for the whole month's hire although he subsequently withdrew the ship from the service of the charterers before the month had expired. It would be strange if the law should allow the owner to withdraw his ship on January 11 and yet claim payment of a full month's hire in advance dating from 10 P.M. on the previous day; but on this point Mr. Wright was prepared to accept

the view of Channell J. in *Wehner* v. *Dene Steam Shipping Co.* (1) that when properly considered the position of a shipowner in such circumstances is that the consideration is apportionable and that he cannot recover hire except for the period during which his ship is actually at the disposal of the charterer. Channell J. expressed his view in these words :—" As the 550*l.* was payable in advance it seems to me that if they did take possession of the ship—supposing they had taken possession of the ship a week after—they could only have claimed to retain one week's hire out of that as a portion. The consideration either wholly or partially failed. I do not think that when the consideration for the payment which ought to be made in advance has not been given the payments can be sued for afterwards." It is not necessary to discuss the correctness of that view. Mr. Wright does not dispute it. He accepts the position that, the owner being entitled to sue for hire in advance, the charterers may by some rule of law reduce the amount payable by a sum representing the time during which the owner deprived them of the use of the vessel, and allowance has been made on account of hire for the ship's service up to and including January 11.

But it is said that the charterparty provided that the hire should continue until the ship's redelivery, and that she cannot be said to be redelivered while on the high seas continuing the voyage commenced under the charterers' orders which have never been cancelled. One must consider the language of the charterparty in order to give that argument its true weight. It is founded on the word " redelivery." As pointed out by Mr. MacKinnon that is not an apt word to express the obligation of either party to the other under such a contract as this. It might be an appropriate word if the ship had been demised, but under a charter like the present by which the owner places the ship with her captain, officers, seamen, engineers, firemen, and crew at the disposal of the charterer for a certain period on certain terms, the only redelivery possible is to make such arrangements as will enable the owner to resume control on the expiration of the charter and,

(1) [1905] 2 K. B. 92, 101 ; 10 Com. Cas. 139, 157.

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Bankes L.J.

it may be, if necessary, to inform the master that he is no longer under the charterer's orders but must consider himself under the orders of the owner. That is the real meaning of the word "redelivery" in this charterparty. Earlier in that instrument the use of the vessel which is to be conferred on the charterers is exactly described. The conferring of that use is spoken of as "delivery as aforesaid." When the use is determined and the vessel is replaced at the owner's disposal that is described as "redelivery." What is meant by replacing the vessel at the owner's disposal? As long as the charterparty continues the charterers retain the right to give to the master directions which he is bound to obey. It may be that "redelivery" of the vessel would ordinarily include giving directions to the master to look to the owner for further orders. But what happened in this case was that the owner withdrew the vessel from the service of the charterers. By so doing he necessarily withdrew from the charterers any right to give further directions to the master. If he chooses to withdraw the vessel while she is on the high seas the same result follows; he thereby withdraws from the charterers the power to give any further directions to the master; the power to give directions revests in the owner. It may be that he cannot exercise the power because he cannot get into touch with the vessel; that is a mere accident, and does not alter the conclusion that when the owner withdraws the ship from the service of the charterers there is nothing more the charterers can do in the way of redelivering the ship to the owner. The material point of time is that moment when as a matter of law the power of giving orders to the master passes from the charterers to the owner, and that is the moment when the owner chooses to exercise the option of withdrawing the ship from the service of the charterers. It was said that this withdrawal was "without prejudice to any claim the owner may otherwise have on the charterers in pursuance of this charter." In my opinion that clause saves the rights of the owner in reference to breaches of the charterparty which may have been committed, or any right which may have already accrued; it does not place the charterers under any fresh obligation coming into force after

the date when the ship has been withdrawn. For these reasons I think the judgment of Sankey J. was right and this appeal must be dismissed.

DUKE L.J. I agree. This case raises a novel question as to the liability for hire between January 11, 1917, the date of the notice given by the agents of the shipowner to the charterers, and January 23, when the ship reached Barry and the master began again to take orders as to the disposition of the ship from the owner. The owner claims that he is entitled to freight during that period by the express terms of the charterparty, and particularly by that clause which provides for hire at the rate of 28*s.* per ton on the steamer's dead weight per month "commencing on the day of her delivery as aforesaid . . . . to continue from the time specified . . . . until her redelivery within the time mentioned above . . . . at a port in West Italy or in the United Kingdom at charterers' option." I agree with Bankes L.J. that "redelivery" here means restoration of the power of disposal to the owner. There had never been a demise of this ship; she remained from first to last in the possession of the owner. "Delivery" and "redelivery" in this clause relate to the same thing, the power of disposition of the ship. When the power of disposition is restored to the owner there is a redelivery within the meaning of the clause. The owner says there was no such restoration until the ship was notionally handed over to him at Barry and came within his reach there. That contention ignores the effect of the notice of January 11, by which the owner declared that the charterparty was cancelled. That put an end to the charterers' right to issue orders to the master. It was a resumption by the owner of the right to dispose of the ship's services, and after that resumption of control any further obligation upon the charterers to surrender control was at an end.

Then it was said that the owner, if not entitled to freight under that clause, is entitled to damages to an equal amount for the charterers' breach of contract, the breach being the failure of the charterers to pay punctually the hire due on

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Duke L.J.

January 10, that this breach occurred while the ship was beyond the reach of the owner so that he could not resume effective control of her, and that therefore he is entitled as damages to an amount equal to hire for the period from January 11 to January 23 when he got possession of his ship at Barry. That argument is fallacious. The non-payment of the hire was not the cause of loss, if any, incurred by the owner through not getting possession of his ship till January 23. The real cause was his own act in withdrawing his ship of his own volition on January 11 when he was well able to make an advantageous choice between leaving control to the charterers and assuming it himself. Having done that act, presumably with a just view of his own interest, he cannot rely upon it as giving him a right to damages.

Mr. Wright contended that by the terms of the charterparty the withdrawal of the ship was without prejudice to any claim of the owner against the charterers, and that on January 10 there was a complete cause of action for a month's hire under the charterparty, of which the charterers could only avoid payment in full upon grounds of commercial fairness or equity. But he elected, no doubt on good grounds, not to challenge the decision of Channell J. in *Wehner* v. *Dene Steam Shipping Co.* (1) that in a case like this where the owner has resumed control of the ship before the month has expired, he can only claim an apportioned part of the month's hire. Once that is admitted the claim for a full month's hire, tempered or modified though it be on grounds of fairness or equity, falls to the ground. On these grounds the judgment of Sankey J. must be affirmed.

A. T. LAWRENCE J. I agree with Mr. MacKinnon's argument that it is impossible to construe the word "redelivery" in this charterparty in a literal sense. This is not a contract of demise. It is an ordinary contract whereby the possession of the ship remains in the shipowner. The services of the ship, master, and crew were let to the charterers who could

(1) [1905] 2 K. B. 92.

never do more by way of redelivery than restore or give up those services to the owner. Here the owner himself intervened and, exercising his right upon non-payment of a month's hire in advance, withdrew the vessel from the service of the charterers, who could no longer restore that which had already been resumed. It is said that this left unaffected a cause of action in respect of the month's hire. I think in one sense it did. There was a vested cause of action. But to my mind it was not an action of debt but one for damages for breach of a promise to pay hire, the consideration for which was not executed. Therefore the shipowner can recover the damages he has actually suffered, but no more; and as he resumed control on January 11 he cannot claim in respect of hire after that date. It is not a case of debt for an apportioned part of the month's hire, or upon a partial failure of consideration, but rather a question of the true measure of damages sustained by the shipowner through non-performance of the charterers' promise to pay a month's hire in advance on January 10. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Constant & Constant.*

Solicitors for respondent: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff.*

W. H. G.

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1919
March 21, 24.

[IN THE COURT OF APPEAL.]

JANVIER *v.* SWEENEY AND ANOTHER.

[1917 J. 1217.]

Action on the Case—False Words—Threats—Nervous Shock—Special Damage —Remoteness—Principal and Agent—Scope of Employment.

False words and threats calculated to cause, uttered with the knowledge that they are likely to cause, and actually causing physical injury to the person to whom they are uttered are actionable.

The defendants were two private detectives. One of them was designing to inspect certain letters, to which he believed the plaintiff, a maid servant, had means of access. He instructed the other defendant, who was his assistant, to induce the plaintiff to show him the letters, telling him that the plaintiff would be remunerated for this service. The assistant endeavoured to persuade the plaintiff by false statements and threats, as the result of which the plaintiff fell ill from a nervous shock.

In an action by the plaintiff against the defendants for damages :—

Held, that the assistant was acting within the scope of his employment and that both the defendants were liable.

Wilkinson v. *Downton* [1897] 2 Q. B. 57 approved.

APPLICATION for judgment or a new trial.

The action was for damages for false statements wilfully and maliciously made by the defendants to the plaintiff, intended to cause and actually causing her physical injury. The plaintiff alleged that in consequence of the statements made to her she sustained a severe shock and became incapacitated from following her employment, and suffered from neurasthenia, shingles, and other ailments. She alleged special damage to the amount of 57*l.* 15*s.*

The defendants denied that they had made the statements alleged, and denied that the statements, if made, were calculated or intended to cause physical injury to the plaintiff. They also denied that the plaintiff had suffered any injury as the result of the alleged statements, and submitted that the statement of claim disclosed no cause of action.

The action was tried before Avory J. and a common jury.

The plaintiff was a Frenchwoman residing in a house in

John Street, Mayfair, as companion to a Mrs. Rowton. She had been for some five years engaged to be married to a German named Neumann against the wishes of her relatives. In July, 1915, Neumann was interned in the Isle of Man. The plaintiff had been twice to see him and was in the habit of corresponding with him there.

A constant visitor at the house in John Street was one who throughout the proceedings was referred to as Major X. In June or July, 1917, a Miss Marsh came to live there with Mrs. Rowton.

The defendant Sweeney had been a detective inspector at Scotland Yard. After twenty-seven years' service he had retired with a pension, and had for fifteen years been engaged in the occupation of a private detective or inquiry agent. The other defendant, Barker, had been in Sweeney's employment, assisting him in his business since May, 1916.

Miss Marsh had in her possession certain letters purporting to be written by Major X., of which he was anxious to obtain inspection, conceiving them to be forgeries. He applied to Sweeney to help him to a conclusion as to their authenticity. Sweeney told Barker to go to the house in John Street and, if possible, to see the plaintiff, and ask her if she had seen any letters from Major X. in any of the rooms used by Miss Marsh and, if so, to request that he might be allowed to compare the handwriting of any such letters with genuine handwriting of Major X. Sweeney knew that some inducement would be offered to the plaintiff, and told Barker that the plaintiff would be remunerated if she produced the letters for inspection.

On July 16, 1917, at 8 P.M., Barker called at the house in John Street and saw the plaintiff. There was a conflict of evidence as to what Barker said. In answer to questions put to them by the learned judge the jury found (1.) That Barker used the words: "I am a detective inspector from Scotland Yard, and represent the military authorities. You are the woman we want, as you have been corresponding with a German spy." (2.) That Barker was acting within the scope of his authority as agent for Sweeney in making

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those statements. (3.) That the statements or some of them were calculated to cause physical injury to the plaintiff. (4.) That the statements or some of them were made maliciously, that is, with the knowledge that they were likely to cause such injury. (5.) That the illness from which the plaintiff suffered was caused by the utterance of the statements or some of them. The jury awarded the plaintiff 250*l.* damages. On these findings the learned judge entered judgment for the plaintiff.

The defendants appealed.

J. Cecil Hayes for the appellant Sweeney.

Turrell for the appellant Barker.

The learned judge based his decision on *Wilkinson* v. *Downton* (1), the ruling of which was accepted in *Dulieu* v. *White & Sons.* (2) The case was wrongly decided and ought not to be followed. Words not actionable per se may become actionable if followed by damage which is often described as the natural and reasonable consequence, but which would be better defined as the appropriate consequence, of the words spoken. For example, defamatory words not actionable per se become actionable if followed by loss of reputation, that being the natural and reasonable or the appropriate result of defamatory words. False words spoken of a tradesman's wife and likely to deter customers if published abroad are actionable at the suit of the trader if loss of custom is the result: *Riding* v. *Smith* (3); because it is an appropriate result. But defamatory words inducing ill health if not actionable per se are not actionable at all: *Allsop* v. *Allsop* (4); *Terwilliger* v. *Wands* (5); *Wilson* v. *Goit* (6); because injury to health is not an appropriate consequence of spoken words. It is not enough for the respondent to show that illness in fact followed the words. In the words of Pollock C.B. in *Allsop* v. *Allsop* (7): "The Courts here have always taken care that parties shall not be responsible for fanciful or remote

(1) [1897] 2 Q. B. 57.
(2) [1901] 2 K. B. 669.
(3) (1876) 1 Ex. D. 91.
(4) (1860) 5 H. & N. 534.
(5) (1858) 17 N. Y. 54.
(6) Ibid. 442.
(7) 5 H. & N. 538.

damages, or in fact any that do not fairly and naturally result from the wrongful act itself. . . . . This particular damage depends on the temperament of the party affected, and it may be laid down that illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground of action." Bramwell B. says that no such special damage as is here alleged was ever heard of as a ground of action. (1) "It would be highly impolitic to hold all language, wounding the feelings and affecting unfavourably the health and ability to labour, of another, a ground of action; for that would be to make the right of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable per se, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result": *Terwilliger* v. *Wands*. (2) The difficulty of connecting the alleged illness with the words spoken is one of many good reasons for rejecting the former as a natural or appropriate consequence of the latter: *Victorian Railways Commissioners* v. *Coultas*. (3) The words found by the jury to have been spoken were not actionable per se; they were not followed by any damage which the law regards as their natural or appropriate consequence; and therefore they were not actionable.

Secondly, the illness of the respondent was not proved to

(1) 5 H. & N. 539. (2) 17 N. Y. 60, 61.
(3) (1888) 13 App. Cas. 222, 226.

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be the consequence of the words spoken by the appellant Barker. Anxiety on account of Neumann was enough, according to the medical evidence, to account for all her sufferings. The respondent was bound to show that they were attributable to the words of Barker: *Wakelin* v. *London and South Western Ry. Co.* (1)

Thirdly, the appellant Barker was not acting within the scope of his employment when he used threats and false statements to persuade the respondent. The appellant Sweeney is therefore not liable.

Lewis Thomas K.C. and *Jowitt* for the respondent were not called on.

BANKES L.J. The object of this appeal, which has been very fully and ably argued, is to get the verdict and judgment for the plaintiff set aside and to have judgment entered for the defendants or a new trial ordered. Some of the points taken were urged on behalf of both the defendants. One point was urged on behalf of the defendant Sweeney alone. The main contention of the defendants is that the action is not maintainable at all, but some of the answers of the jury are also challenged. The case for the plaintiff was that she was employed by a lady in whose house she resided; that on July 16, 1917, a man called at the house and told her that he was a detective inspector from Scotland Yard representing the military authorities, and that she was the woman they wanted as she had been corresponding with a German spy. Her case was that she was extremely frightened, with the result that she suffered from a severe nervous shock, and she attributed a long period of nervous illness to the shock she received as a result of the language used to her at that time. If she could establish the truth of that story and satisfy the jury that her illness was the direct result of the shock she was entitled to maintain this action. At the trial the defendants disputed the plaintiff's story altogether. They said that Barker had never spoken the words alleged, and that, so far from suffering any shock, the plaintiff was a very self-possessed

(1) (1886) 12 App. Cas. 41.

woman with her wits about her all the time the defendants were in communication with her and mainly occupied in attempting to trick these two men whom she suspected of being private inquiry agents. These matters were entirely for the jury. The Court cannot interfere with their findings merely because we might think the opposite inference preferable. Manifestly the learned judge would not have arrived at the same conclusion. The defendants cannot complain of the summing up. But in spite of that summing up in favour of the defendants, the jury accepted the plaintiff's story, and their finding as to the words used by Barker is not challenged in this Court. We must take it then that Barker went to this house and deliberately threatened the plaintiff in order to induce or compel her to commit a gross breach of the duty she owed to her employer. It is no longer contended that this was not a wrongful act which would amount to an actionable wrong if damage which the law recognizes can be shown to have flowed directly from that act. Mr. Turrell contended that no action would lie for words followed by such damage as the plaintiff alleges here. In order to sustain that contention it would be necessary to overrule *Wilkinson* v. *Downton*. (1) In my view that judgment was right. It has been approved in subsequent cases. It did not create any new rule of law, though it may be said to have extended existing principles over an area wider than that which they had been recognized as covering, because the Court there accepted the view that the damage there relied on was not in the circumstances too remote in the eye of the law. The substance of that decision may be found in the following passage from the judgment of Wright J. After referring to the doctrine of *Pasley* v. *Freeman* (2) and *Langridge* v. *Levy* (3) the learned judge said (4): "I am not sure that this would not be an extension of that doctrine, the real ground of which appears to be that a person who makes a false statement intended to be acted on must make good the damage naturally resulting from its being acted on. Here there is no injuria of

(1) [1897] 2 Q. B. 57.
(2) (1789) 3 T. R. 51.
(3) (1837) 2 M. & W. 519.
(4) [1897] 2 Q. B. 58, 59.

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that kind. I think, however, that the verdict may be supported upon another ground. The defendant has, as I assume for the moment, wilfully done an act calculated to cause physical harm to the plaintiff—that is to say, to infringe her legal right to personal safety, and has in fact thereby caused physical harm to her. That proposition without more appears to me to state a good cause of action, there being no justification alleged for the act. This wilful injuria is in law malicious, although no malicious purpose to cause the harm which was caused nor any motive of spite is imputed to the defendant." The learned judge went on to consider the cases cited to him, and pointed out that those cases do not conflict with the law he was laying down. That case was subsequently considered in *Dulieu* v. *White & Sons.* (1) I would refer to two passages from the judgment of Phillimore J. He said (2): "I think there may be cases in which A. owes a duty to B. not to inflict a mental shock on him or her, and that in such a case, if A. does inflict such a shock upon B.—as by terrifying B. —and physical damage thereby ensues, B. may have an action for the physical damage, though the medium through which it has been inflicted is the mind." He then referred to *Bell* v. *Great Northern Ry. Co. of Ireland* (3) and *Wilkinson* v. *Downton* (4), which he accepted as law, *Jones* v. *Boyce* (5) and *Adams* v. *Lancashire and Yorkshire Ry. Co.* (6), and proceeded thus (7): "These principles and cases seem to establish that terror wrongfully induced and inducing physical mischief gives a cause of action"; and further on (8): "Once get the duty and the physical damage following on the breach of duty, and I hold that the fact of one link in the chain of causation being mental only makes no difference." I adopt those passages which seem to me to state the law accurately. If the law so stated applies to this case it follows that the plaintiff is entitled to succeed. With reference to Mr. Turrell's contention based on some observations in

(1) [1901] 2 K. B. 669.
(2) Ibid. 682.
(3) (1890) 26 L. R. Ir. 428.
(4) [1897] 2 Q. B. 57.
(5) (1816) 1 Stark. 493.
(6) (1869) L. R. 4 C. P. 739.
(7) [1901] 2 K. B. 683.
(8) Ibid. 685.

Allsop v. *Allsop* (1), it must be remembered that that was an action for slander. The distinction between actions of slander and actions of this kind is very clear. In slander it is necessary to prove publication, and so the words must have been uttered to some person other than the person complaining of the physical injury. The language of the judgments must be read with reference to the fact that the action was for slander. I agree there are some expressions in the judgments which would seem to indicate that the judges took a view similar to that taken by the Privy Council in *Victorian Railways Commissioners* v. *Coultas*. (2) In *Allsop* v. *Allsop* (3) Pollock C.B. said: "In actions for making false charges before magistrates, for giving false characters, and for torts of all kinds, illness might be said to have arisen from the wrong sustained by the plaintiff. The case of *Ford* v. *Monroe* (4) is the only authority that has any tendency to throw light on the argument; but we ought not to act upon the authority of that case, opposed as it is to the universal practice of the law in this country. The Courts here have always taken care that parties shall not be responsible for fanciful or remote damages, or in fact any that do not fairly and naturally result from the wrongful act itself." The opinion of Bramwell B. was to the same effect. "A wrong is done to the female plaintiff who becomes ill, and therefore there is damage alleged to be flowing from the wrong; and I think it did in fact so flow. But I am struck by what has been said as to the novelty of this declaration, that no such special damage ever was heard of as a ground of action." (5) It may be true to say that those remarks, though not necessary for the decision of the case, do point to the conclusion arrived at in *Victorian Railways Commissioners* v. *Coultas* (2): but of late years a different view has been taken on the subject of physical injuries or illness in certain circumstances forming sufficient grounds for special damage. I need only refer to the opinion of Lord Shaw in *Coyle* v. *John Watson, Ld.* (6),

(1) 5 H. & N. 534.
(2) 13 App. Cas. 222.
(3) 5 H. & N. 534, 538.
(4) (1838) 20 Wendell, 210.
(5) 5 H. & N. 534, 539.
(6) [1915] A. C. 1.

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where he deals with *Victorian Railways Commissioners* v. *Coultas* (1) and to all the decisions in which that judgment is criticized, and says: "I am humbly of opinion that the case can no longer be treated as a decision of guiding authority." (2) Wright J. in his judgment in *Wilkinson* v. *Downton* (3) and Kennedy and Phillimore JJ. in *Dulieu* v. *White & Sons* (4) were only following the universal view recently adopted of the decision in *Allsop* v. *Allsop*. (5) In my view of the present state of the authorities it is impossible to suggest that *Wilkinson* v. *Downton* (3) is not good law or that it ought to be reversed. So much for the main point.

The second point was that the plaintiff did not discharge the onus of proof because this was a case in which, as was said in *Wakelin* v. *London and South Western Ry. Co.* (6), the evidence was equally consistent with the existence and the non-existence of a cause of action, and therefore it was not competent to the judge to leave the matter to the jury; it was said that the illness which the plaintiff attributed to the shock caused by the language used by Barker might just as easily and more probably have been produced by anxiety of mind in a woman engaged with the strong disapproval of her relatives to one who was interned as an alien enemy; and that the medical evidence is equally consistent with the existence as with the absence of a cause of action. This argument ignores the plaintiff's own evidence. She said that the words of Barker caused her a terrible shock and that she was in a state of collapse. Something happened on the following day which the doctors say might have been caused by a shock and which the plaintiff says was directly caused by, and was the direct consequence of, the shock. She says "my illness was caused by what happened. It was the greatest shock I ever had in my life." She also described how after the defendant Barker called she sat on the stairs from midnight till five o'clock in the morning with a police whistle in her hand and did not sleep; and George Mercer,

(1) 13 App. Cas. 222.
(2) [1915] A. C. 13.
(3) [1897] 2 Q. B. 57.
(4) [1901] 2 K. B. 669.
(5) 5 H. & N. 534.
(6) 12 App. Cas. 41.

the detective inspector from Vine Street, says that when the plaintiff came to his office on the same day at nine o'clock in the evening she was crying, and that it was five minutes before he could get her story. The defendants of course make light of that evidence; but the jury accepted it. It was clear evidence connecting her illness with Barker's threats and the shock which followed them. The medical witnesses were of opinion that, assuming the facts, the illness might well be the result of the shock. In cross-examination they admitted that it might also follow from mental anxiety. Of course it might; but that leaves the case a long way from the principle of *Wakelin* v. *London and South Western Ry. Co.* (1), and the learned judge was right in holding that he was bound to leave the matter to the jury. Then was the verdict against the weight of the evidence? Was it one which reasonable men could not have arrived at? I cannot say it was. If the jury believed the plaintiff their verdict was one which reasonable persons could have given.

I pass on now to consider Mr. Hayes' argument for the defendant Sweeney, that Barker, assuming that he threatened the plaintiff as she asserts, was not acting within the scope of his employment. The real contention was that this act of Barker in threatening the plaintiff could not in law be held to be within the scope of his employment, because, first, he had no actual authority; and secondly, it is not to be supposed that a private inquiry agent would give his agent instructions to do such an act. The judge put this point rather more favourably to the defendants than he need have done. He asked them whether Barker was acting in the scope of his employment. The jury answered yes, and they were quite justified in so answering. If the matter requires further consideration there is ample authority for holding Sweeney responsible for the act of his agent Barker. No imputation was cast on the way in which Sweeney carries on his business. If a private detective employs agents in his business he exposes himself to very grave risks. As was said by Willes J. in *Barwick* v. *English Joint Stock Bank* (2):

(1) 12 App. Cas. 41. (2) (1867) L. R. 2 Ex. 259, 266.

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"It is true, he has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in." Barker was sent by Sweeney, his employer, to procure from the plaintiff by some form of inducement certain letters which Sweeney's principal had instructed him to get, not to keep, but for the purpose of comparing the handwriting of the letters with genuine handwriting of Sweeney's principal. Sweeney's object was to get temporary possession of these letters. He knew that to attain his object it would be necessary to offer the plaintiff some inducement to commit a gross breach of duty. He plainly put Barker in his place to do that class of acts, telling him that a remuneration would be offered in return for the letters. If then Barker carried out his instructions by means of a threat, as being a more effective and less expensive inducement than a bribe, Sweeney must be answerable for the manner in which Barker conducted himself in doing the business entrusted to him. It is impossible to disturb either the verdict or the judgment, and this appeal must be dismissed.

DUKE L.J. I am anxious to avoid overlaying or weakening the force of the judgment which has just been delivered, with every word of which I agree. My observations will therefore be brief. This is a much stronger case than *Wilkinson* v. *Downton*. (1) In that case there was no intention to commit a wrongful act; the defendant merely intended to play a practical joke upon the plaintiff. In the present case there was an intention to terrify the plaintiff for the purpose of attaining an unlawful object in which both the defendants were jointly concerned.

Mr. Turrell contended on the authority of *Allsop* v. *Allsop* (2) and other cases that the damage alleged was too remote in law, and therefore the third and fifth answers of the jury were irrelevant. In my view *Allsop* v. *Allsop* (2) does not warrant the conclusion which Mr. Turrell would draw from

(1) [1897] 2 Q. B. 57. (2) 5 H. & N. 534.

it. In that case Mr. Quain for the defendant pointed out that the words complained of were not alleged to have been uttered in the presence of the female plaintiff, and the judgments make it clear that in cases of the class of *Pasley* v. *Freeman* (1), where special damage is the gist of the action, care must be taken that the special damage alleged is the fair and natural consequence of the act complained of; that damages from loss of reputation would afford ground for an action of slander, but that shock and illness arising from the excitement which the slanderous language may produce is not that sort of damage which forms a ground for that action. Mr. Turrell went further and argued that it had been held as matter of law that injury to health resulting from a nervous shock cannot be regarded as special damage, and he cited *Victorian Railways Commissioners* v. *Coultas*. (2) To say that as matter of law certain damage cannot follow as matter of fact is a confusion of thought or expression, but be that as it may, in *Wilkinson* v. *Downton* (3) Wright J., differing from *Victorian Railways Commissioners* v. *Coultas* (2), held that illness resulting from nervous shock might be the immediate consequence of a wrongful act and might give a cause of action. This decision was approved in *Dulieu* v. *White* (4), and the views of Kennedy and Phillimore JJ. in that case were confirmed in the House of Lords in *Coyle* v. *John Watson, Ld.* (5) It seems to me that so far as concerns remoteness in law and existence in fact there is nothing to distinguish the damage in the present case from the damage in *Wilkinson* v. *Downton* (3) and *Dulieu* v. *White & Sons*. (4) Those two cases appear to me to state elementary principles of law, and where a case comes immediately within them the alarming consequences foretold by counsel for the appellants afford no ground for withholding from the respondent that relief to which in the opinion of the jury she is entitled.

As to the other point, I have a difficulty in appreciating the relevancy of questions as to the scope of Barker's authority.

(1) 3 T. R. 51.
(2) 13 App. Cas. 222.
(3) [1897] 2 Q. B. 57.
(4) [1901] 2 K. B. 669.
(5) [1915] A. C. 1.

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The law as to the extent of an agent's authority cannot apply so as to exonerate one of two participants in an unlawful undertaking. But if the scope of Barker's agency is to be considered, it was recognized by both defendants that he might accomplish their object by bribery. He was to obtain the letters and was not restricted to lawful means. He might bribe, and I think there was authority to use the cheaper means of threats, which do not usually give a cause of action. In this case the threats produced physical injury and were actionable, but that does not take them out of the agent's authority. There was therefore a wrong done by the agent in the course of his employer's business and for his employer's purposes. In the result, whether the defendants were principals or principal and agent, in either case they are liable.

A. T. LAWRENCE J. I am of the same opinion. I do not desire to add anything upon the question of Barker's authority beyond saying that in my view the summing up was unduly favourable to the defendant Sweeney. As to the other point it seems clear on the authority of *Wilkinson* v. *Downton* (1) and on general principles that the verdict of the jury cannot be disturbed. The defendants attempted to get possession of the letters by instigating the plaintiff to commit a trespass and a breach of confidence. The means they used were false statements made to the plaintiff calculated to cause terror. It was found by the jury that the statements caused physical injury to the plaintiff. The plaintiff's evidence had to be considered. The jury accepted it. They saw the plaintiff and came to the conclusion on the evidence before them that these wrongful acts directly caused physical injury to the plaintiff, and there is no ground for rejecting their verdict.

Mr. Turrell sought to apply the principles applicable to an action of slander per quod. But those principles are inapplicable to a case like the present. The gist of that action is injury to the reputation of the plaintiff caused by statements made not to the plaintiff but to third persons.

(1) [1897] 2 Q. B. 57.

There is no direct injury from the defendant to the plaintiff in that case. The injury is suffered at the hands of third persons to whom the slander is repeated. As pointed out by Duke L.J., *Allsop* v. *Allsop* (1) was tried on demurrer to the declaration, there was no allegation that the words were spoken in the presence of the plaintiff, and there was no direct connection between the act of the defendant and the injury to the plaintiff's health; the words as spoken by the defendant may never have reached the plaintiff. In those circumstances it was held that the illness of the plaintiff in that case caused by the acts of third persons was not the natural result of the words originally spoken by the defendant. The case is altogether different where the illness is caused by words spoken directly by the defendant to the plaintiff. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for appellants: *L. O. Glenister.*
Solicitor for respondent: *R. J. Preston.*

(1) 5 H. & N. 534.

W. H. G.

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April 7.

In re MAXSON.

Ex parte THE TRUSTEE.

In re SAME.

Ex parte LAWRENCE & LAWRENCE, LIMITED.

Bankruptcy—Proof of Debt—Secured Creditor—Omission to value Security—Vote in respect of "whole debt"—"Inadvertence"—Amendment of Proof—Terms on which Amendment allowed—Bankruptcy Act, 1914 (4 *&* 5 *Geo.* 5, *c.* 59), *First Schedule, clause* 10; *Second Schedule, clauses* 13, 14, 16.

By clause 10 of the First Schedule to the Bankruptcy Act, 1914: "For the purpose of voting, a secured creditor shall, unless he surrenders his security, state in his proof the particulars of his security . . . . and the value at which he assesses it, and shall be entitled to vote only in respect of the balance (if any) due to him, after deducting the value of his security. If he votes in respect of his whole debt he shall be deemed to have surrendered his security unless the Court on application is satisfied that the omission to value the security has arisen from inadvertence."

In January, 1918, the managing director of the respondents, a limited company, lent the debtor on behalf of the respondents 1000*l.*; and, by way of security for the loan, the debtor delivered to him a pawnticket and a motor car together with a letter stating that the pawnticket and the motor car were to be held as security for the loan. On the previous day the managing director had on his own personal account advanced to the debtor 1000*l.* A lady secretary to the respondents, who also kept the managing director's private books, prepared the details of a proof of the indebtedness of the debtor to the respondents, which amounted in the whole to upwards of 3300*l.* and, in error, thought that the pawnticket and motor car were given as security for the 1000*l.* lent by the managing director personally instead of for the 1000*l.* lent by him on behalf of the respondents. On May 7, 1918, the managing director, on behalf of the respondents, swore the proof which contained no reference to the pawnticket or motor car, and stated that the respondents had not received any security whatsoever except certain acceptances. He did not prove for the 1000*l.* due to him personally. On May 8, 1918, the managing director, on behalf of the respondents, voted at a meeting of creditors in respect of the whole debt comprised in the proof of May 7. In April and July, 1918, respectively he paid interest to the pawnees of the necklet, and in October, 1918, he paid an amount for repairs to the motor car. In August, 1918, he sold the pawnticket, and in October, 1918, the motor car. At a private sitting held on November 13, 1918, he stated that no security had been given to the respondents in respect of their loan of 1000*l.*, but on

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November 20, 1918, the second day of his examination, he stated that he had on behalf of the respondents received the pawnticket and motor car. There was no evidence that before his examination on May 20, 1918, he knew that information as to the facts had reached the trustee.

On a motion by the trustee for a declaration that the respondents, by voting in respect of the whole debt, had abandoned the securities and for an order that the proceeds of their sale be paid to the trustee, and a cross-motion by the respondents for leave under clause 10 of the First Schedule and clauses 13, 14 and 16 of the Second Schedule to the Act of 1914 to amend their proof by inserting therein particulars and the value of the securities:—

Held, that upon the facts the omission to value the securities was due to inadvertence within the meaning of clause 10 of the First Schedule, and therefore the trustee's motion failed and the cross-motion of the respondents for leave to amend their proof succeeded; but as it was the duty of the trustee to bring the matter before the Court, the amendment would be allowed only on payment of the trustee's costs of the motion and cross-motion.

MOTION on behalf of the trustee of the estate of the bankrupt Joseph Maxson for a declaration that the respondents, Lawrence & Lawrence, Ld., by voting at a meeting of creditors of the bankrupt held on May 8, 1918, in respect of the whole debt comprised in a proof of the respondents sworn by or on behalf of them on May 7, 1918, surrendered for the benefit of the creditors of the bankrupt certain securities held by the respondents for the debt consisting of a pawnticket, a pearl necklace pawned by the bankrupt with Messrs. Jay, and a Mors motor car, and that the respondents were not entitled to rank as secured creditors on the said property in priority to the trustee, and for an order that the respondents, having sold the pawnticket for 350*l.* and the motor car for 70*l.*, making together the sum of 420*l.*, and having received the proceeds of sale might be ordered to pay to the trustee the said sum of 420*l.* and costs.

The respondents by cross-motion applied for an order that they might be at liberty under clause 10 of Schedule 1 and clauses 13, 14 and 16 of Schedule 2 of the Bankruptcy Act, 1914, at their expense to amend their proof of debt by inserting therein the particulars of the security held by them and valuing the same at 420*l.*

On April 27, 1918, a receiving order was made against the debtor Joseph Maxson, and upon the same day the debtor

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was adjudicated a bankrupt. Lawrence Lawrence was the managing director of the respondents Lawrence & Lawrence, Ld., and on May 7, 1918, he made a proof on behalf of the respondents of a debt of 3356*l.* 5*s.* 1*d.* due from the debtor to the respondents. The proof contained the statement that the respondents had not received any security whatsoever except certain acceptances, and contained no reference to the pawnticket or motor car mentioned below, which Lawrence Lawrence in fact had received from the bankrupt as security for a loan of 1000*l.* made by him on behalf of the respondents to the bankrupt on January 11, 1918, and which was part of the whole debt of 3356*l.* 5*s.* 1*d.* On May 8, 1918, Lawrence Lawrence, on behalf of the respondents, voted at a meeting of the creditors of the bankrupt in respect of the whole debt of 3356*l.* 5*s.* 1*d.*

At a private sitting held on November 13, 1918, Lawrence Lawrence stated that no security had been given to the respondents in respect of the loan of 1000*l.*, but on November 20, the second day of his examination, he stated that he had received from the bankrupt, on behalf of the respondents, a Mors car and a pawnticket for a necklet which the bankrupt had pawned with Messrs. Jay for 1150*l.*, and that he, on behalf of the respondents, sold the pawnticket in August, 1918, for 350*l.* and the Mors car in October, 1918, for 70*l.*, making together 420*l.* On January 11, 1918, the debtor gave to Lawrence Lawrence, acting on behalf of the respondents, the following letter: "I beg to thank you for your favour of to-day, and, as arranged, enclosed please find the receipt from Jays for 1150*l.*, to be held by you as security in addition to my Mors car for the money lent by you to me."

The letter was addressed to Lawrence Lawrence personally, but it was given to him acting on behalf of the respondents, and referred to the loan of 1000*l.* made by them to the bankrupt. Lawrence Lawrence made an affidavit with a view to showing how the omission in the proof arose, and was cross-examined upon his affidavit. His evidence was to the effect that it was quite an unusual thing to take as security a pawnticket

and a motor car. He took the security and obtained the letter from the debtor of January 11, 1918, because on that day he had, on behalf of the respondents, lent him money. The details of the proof were prepared by a lady secretary to the respondents, who also kept his own private books. She thought that the letter related to a loan of 1000*l.* made by him personally to the bankrupt on January 10, 1918, and so dealt with it. That 1000*l.* had no reference to the loan by the respondents. She also debited two sums of 43*l.* 2*s.* 6*d.* each paid by him in April and July, 1918, respectively to Messrs. Jay for interest, and an amount paid by him in October, 1918, for repairs to the car to his private account, thus showing she was quite ignorant of the true position. He had no intention of abandoning or giving up the securities. He had not the securities in mind, and did not give them a thought when he swore the proof. He left everything to his bookkeeper. The lady was still employed in the office of the company. He had been in business for forty years and had never made a proof in bankruptcy before.

Tindale Davis for the respondents admitted that Lawrence Lawrence voted on behalf of the respondents at the meeting of creditors held on May 8, 1918, in respect of the whole debt of 3356*l.* 5*s.* 1*d.*

Clayton K.C. and *Hansell* for the trustee. It is for the respondents to satisfy the Court that the omission to value the security arose from inadvertence within the meaning of clause 10 of the First Schedule to the Bankruptcy Act, 1914. In order to constitute inadvertence the creditor must be oblivious to the existence of the security. But in the present case the security was merely debited to the wrong account. That does not constitute inadvertence: *In re Pawson* (1);

(1) Reported upon another point in [1917] 2 K. B. 527. In that case in dealing with the question whether there had been "inadvertence" on the part of the creditor Captain Bewicke within the meaning of clause 10 of the First Schedule to the Bankruptcy Act, 1914, Horridge J. said in reading his considered judgment: "The question I have to consider is whether or not I am satisfied that the omission to value the security arose from inadvertence. In *Ex parte Clarke* (2) Vaughan Williams J. took the view that inadvertence would not be

(2) [1898] 1 Q. B. 627.

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In re Piers (1); *Ex parte Clarke.* (2) In the proof Lawrence Lawrence did not merely deny that the respondents held any security, but he specified the acceptances, and stated that there was no other security. That was a positive statement, and there is the further fact that he has not proved for the 1000*l.* he alleges he personally lent the bankrupt. He knew in October, 1918, that the debt to the respondents had been diminished by 420*l.*, the amount realized by the sale of the pawnticket and motor car given as security, and yet on November 13, 1918, he did not mention the fact. The inference is that on November 13, 1918, he thought it desirable not to mention the security. There is no sufficient evidence of inadvertence: *In re Safety Explosives* (3); *In re Rowe.* (4)

Tindale Davis for the respondents. The omission to value the security arose from inadvertence on the part of Lawrence Lawrence, due to the error of the lady secretary, who was the respondents' secretary and his bookkeeper, in confusing the 1000*l.* due to them with the 1000*l.* due to Lawrence Lawrence personally. There is no distinction between the present case and *Ex parte Clarke.* (2) The facts in *In re Piers* (1), *In re Safety Explosives* (3), and *In re Rowe* (4) were quite different.

Clayton K.C. in reply. In every case the question whether there has been inadvertence is a question of fact. In the present case the respondents have not discharged the onus of proof which is upon them. Although Lawrence Lawrence

constituted in a case in which the creditor balancing the advantage and disadvantage of stating and valuing his security deliberately elects to prove for his whole debt, but as was pointed out by that learned judge when sitting in the Court of Appeal in *In re Safety Explosives* (5), this was mentioned amongst things which could not constitute inadvertence, and I do not consider that in the earlier case the learned judge intended to lay down an exclusive definition. It must always, I think, be a question of fact whether the judge is satisfied the omission the value has arisen from inadvertence. In his judgment in *In re Safety Explosives* (5) Williams L.J. speaks of 'the onus which was clearly on him of showing that the omission was caused by inadvertence.'"

(1) [1898] 1 Q. B. 627.

(2) (1892) 40 W. R. 608; 67 L. T. 232.

(3) [1904] 1 Ch. 226.

(4) [1904] 2 K. B. 489.

(5) [1904] 1 Ch. 226, 233.

was reminded of the security he held on their behalf in January, 1918, by the pawnticket and letter of January 11, by the payment of interest on the pawnticket in April and July, 1918, and by the sale of the pawnticket in August, 1918, and the motor car in October, 1918, he swore on November 13, 1918, that he held no security. The fact that the lady secretary made certain erroneous assumptions does not displace his statement.

HORRIDGE J., having stated the facts, continued: I have to ask myself whether or not the omission to value the motor car and pawnticket arose from inadvertence. The onus is on the creditor to show that the omission arose from inadvertence. That appears from a passage in Vaughan Williams L.J.'s judgment in *In re Safety Explosives* (1), where he said: "I do not think he has satisfied the onus which was clearly on him of shewing that the omission was caused by inadvertence."

Was the omission in the present case caused by inadvertence or not? In order to determine that question I have to ask myself: "What possible reason could have led the respondents to abstain from valuing the articles in the proof except inadvertence?" The only answer which might be given is, it seems to me, that Lawrence Lawrence wanted to keep them as a security for his own debt, and if it could have been shown to me that before his last examination he knew that the trustee had ascertained the facts with regard to the sale of the motor car and pawnticket, and that he therefore made a clean breast of it at that examination, I should have felt inclined to hold that he deliberately kept back the fact that he held as security the motor car and pawnticket until he knew he was found out. That, clearly, would not have been inadvertence. But, except that, I cannot see what reason there could be for not valuing these things, except that at the time he made the proof he overlooked them. I think the true inference is that he overlooked them at the time he made the proof, and that

(1) [1904] 1 Ch. 226, 233.

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MAXSON, *In re.* THE TRUSTEE, *Ex parte.* SAME, *In re.* LAWRENCE & LAWRENCE, LD., *Ex parte.*

Horridge J.

therefore this proof was made by inadvertence without valuing the securities. The trustee's motion therefore fails and the cross-motion of the respondents succeeds, but the terms on which they can amend their proof must be that they pay the costs of the motion, because it is the duty of a trustee where a security is not valued to bring the matter before the Court, and it consequently follows that the cross-motion had to be brought by the respondents. There will therefore be no order on the trustee's motion except that the respondents pay the costs of the motion, and the respondents' cross-motion will succeed on the terms of their paying the costs of the trustee.

Solicitor for trustee: *Ralph Raphael.*
Solicitors for respondents: *Harris, Chetham & Cohen.*

J. E. A.

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April 2, 3, 4, 16.

[IN THE COURT OF APPEAL.]

EARL HOWE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super-tax—Deductions—Premiums on Policies of Life Assurance—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 163, 164, 190, *Sched. G, r.* xvii.—*Finance* (1909-10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66, *sub-s.* 2.

By the Income Tax Act, 1842, ss. 163, 164 and 190, Sched. G, r. xvii., coupled with s. 66, sub-s. 2, of the Finance (1909–10) Act, 1910, a person liable to super-tax is, for the purposes of the tax, allowed to deduct from his income "every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished."

The appellant effected policies of insurance on his life, and for the purpose of raising money he, by a series of deeds, assigned his life interest in certain estates, together with the policies, to an assurance company by way of mortgage and further charge to secure advances. By the deeds he covenanted to pay (1.) the interest on the mortgages, and (2.) the premiums on the life policies. He further gave a right to the mortgagees, in the event of his failing to pay the premiums, to pay them themselves and to charge the same upon the mortgaged property:—

Held, that in estimating his income for the purpose of super-tax, he was not entitled to deduct the premiums.

Decision of Sankey J. [1918] 2 K. B. 584 reversed.

Lord Massy v. *Inland Revenue Commissioners* [1918] 2 K. B. 598 (*n.* 2) disapproved.

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EARL HOWE *v.* INLAND REVENUE COMMISSIONERS.

APPEAL from the decision of Sankey J. upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts under s. 72, sub-s. 6, of the Finance (1909–10) Act, 1910, and s. 59 of the Taxes Management Act, 1880.

The facts are fully stated in the report in the court below. (1) Shortly they were as follows :—

Earl Howe, being tenant for life of certain estates, effected policies of insurance on his life, and, for the purpose of raising money, he mortgaged his life interest in the estates, together with the policies, to secure advances made to him. He covenanted to pay the interest on the mortgage and the premiums on the policies, and gave the mortgagees, if he should neglect to pay the premiums, the right to pay them themselves and add them to their security. Upon being assessed to super-tax, the Earl claimed to deduct from the assessment the amount of the premiums paid by him. Sankey J. held that the premiums were "annual payments reserved or charged" upon his income, whereby it was, or might be, diminished, within the meaning of ss. 164 and 190, Sched. G, r. xvii., of the Income Tax Act, 1842, and that therefore, in estimating his income for the purpose of super-tax, he was entitled to deduct them. In so holding, Sankey J. considered himself bound to follow the decision of the majority of the Court in the Irish case of *Massy* v. *Inland Revenue Commissioners* (2), but expressed his agreement with the dissenting judgment of Palles C.B. in that case.

The Commissioners appealed.

Sir Gordon Hewart A.-G. and *T. H. Parr* for the Crown. The question is whether Lord Howe, in estimating his income for the purposes of super-tax, is entitled to deduct premiums of insurance on his own life which he has covenanted with his mortgagees to pay.

(1) [1918] 2 K. B. 584. (2) [1918] 2 K. B. 598 (*n.* 2), post, p. 354 (*n.*).

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Super-tax was imposed by s. 66 of the Finance (1909–10) Act, 1910, and by sub-s. (*b*) of that section it was enacted that in estimating the income of the taxpayer there should be deducted the amount of any premiums in respect of which relief from income tax might be allowed under s. 54 of the Income Tax Act, 1853 (as extended by any subsequent enactment). But by s. 36 of the Finance Act, 1916 (6 & 7 Geo. 5, c. 24), the provision as to relief in respect of premiums was taken away. It is said, however, and Sankey J. has so decided, that the premiums in this case are "annual payments reserved or charged thereon whereby the income shall or may be diminished" within ss. 163 and 164 of the Income Tax Act, 1842 (5 & 6 Vict. c. 35). In arriving at his decision Sankey J. felt himself bound, against his own opinion, to follow the decision of the majority of the Court in the Irish case of *Lord Massy* v. *Inland Revenue Commissioners.* (1) He was induced to follow that decision by what was said by Swinfen Eady L.J. in *In re Hartland* (2) and by Horridge J. in *Brooks* v. *Inland Revenue Commissioners.* (3) The decisions of the Scottish Courts followed in both those cases were however unanimous, while in *Lord Massy* v. *Inland Revenue Commissioners* (1) Palles C.B. delivered a dissenting judgment, which it is submitted was right.

The following enactments are material: Finance (1909–10) Act, 1910, s. 66 (2.) (*b*); Income Tax Act, 1842, ss. 163, 164, 190, Sched. G, r. xvii.

In order to succeed the respondent must establish (1.) that these premiums are "annual payments" within the meaning of the statute, and (2.) that they are "reserved or charged" upon Lord Howe's income. It is submitted that he can establish neither of those two points. The mere fact that he is under covenant to keep up the payment of the premiums does not make them such "annual payments." It is necessary to see what is their true nature: *Secretary of State in Council of India* v. *Scoble* (4); *Hill* v. *Gregory.* (5) The

(1) [1918] 2 K. B. 598 (*n.* 2); post, p. 354 (*n.*).
(2) [1911] 1 Ch. 459, 466.
(3) [1913] 3 K. B. 398, 406.
(4) [1903] A. C. 299.
(5) [1912] 2 K. B. 61.

policies were in existence long before the mortgages were effected, and the mere covenants in the mortgage deeds to pay the premiums do not alter the character of the payments. They are none the less payments of premiums upon policies of insurance. It is immaterial that the insurance companies have the right in case of default themselves to pay the premiums and charge them upon their security. The premiums moreover are not payments from which income tax may be deducted by the payer. Unless that be so they cannot be "annual payments" within ss. 164 and 190, Sched. G, r. xvii., of the Income Tax Act, 1842. The scheme of that Act is to collect the tax from the person most easily reached, whether he be the true owner of the income or not. The person assessable, in making his return, is not allowed to deduct annual interest, annuities or other annual payments which he has to make; but he is allowed to pass on to the payee, by deduction, the burden of his proportionate part of the tax. It is only with regard to that kind of payment that a deduction is allowed under s. 164 of the Act of 1842. These premiums are not that kind of payment because the insurance company is not liable to pay income tax on the premiums, but only upon the balance of its profits, although no doubt the premiums form part of those profits. Where a person pays interest on a mortgage he is entitled to deduct the tax from the payment. Not so in the case of insurance premiums. See s. 60, Sched. A, No. 4, r. 10, of the Income Tax Act, 1842, and *London County Council* v. *Attorney-General.* (1)

"Other annual payments" in s. 163 of the Act of 1842 must be construed ejusdem generis with the previous words.

These premiums are not such "annual payments" as are contemplated by s. 164, and if they are they are not "reserved or charged" on the income, and are therefore not deductible in estimating the amount of the income for the purposes of super-tax.

Tomlin K.C., *Hon. W. Finlay K.C.* and *A. M. Bremner* for the respondent. In the circumstances of this case the premiums are "annual payments" which Lord Howe is

(1) [1901] A. C. 26, 38, 41.

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entitled under ss. 163, 164, and 190, Sched. G, to deduct for the purpose of arriving at what is his true income. Lord Howe is under contract to pay the premiums.

[SCRUTTON L.J. Do you include every annual sum payable under a contract ?]

Yes, but not an annual payment made in discharge of a lump sum. *Goslings and Sharpe* v. *Blake* (1) and *Leeds Permanent Benefit Building Society* v. *Mallandaine* (2) are instances of payment in respect of which it was held that tax could not be deducted. These premiums, like interest on mortgages, are annual payments charged on the mortgaged property. The respondent does not claim deduction upon the ground that he has paid life insurance premiums, but because the premiums are "annual payments charged on his income whereby his income is diminished" within s. 164 of the Act of 1842. By virtue of the mortgage deeds they are charged in equity on the property. It is contended for the Crown that a payment in respect of which you cannot deduct income tax as against the payee is not an annual payment which is deductible for the purposes of super-tax. But *Hill* v. *Gregory* (3) affords an instance of an annual sum in respect of which it was held that the payer was not entitled to deduct the tax, but which under s. 164 and s. 190, Sched. G, was nevertheless an annual payment deductible for the purpose of arriving at the free income. The general principle is that a person is only liable to pay tax on his real income. He must therefore be entitled to deduct a payment which he has to make to some other person whose income it is, and who is assessable in respect of it. The question as to how it falls for taxation in the hands of the recipient is irrelevant for this purpose. If a person is under an obligation to make an annual payment he is entitled to deduct it for the purpose of computing his income assessable to super-tax.

If necessary it is submitted that an annual payment to be deductible need not be charged upon the income. In s. 164 the word "reserved" means something different to

(1) (1889) 23 Q. B D. 324. (2) [1897] 2 Q. B. 402.
(3) [1912] 2 K. B. 61.

"charged." See Lord Haldane's judgment in *Sugden* v. *Leeds Corporation.* (1) Reading s. 164 and s. 190, Sched. G, r. xvii., together, a "charge" in the strict sense is not necessary. The practice has always been to allow deduction in respect of an annuity even although not strictly charged. The contention of the Crown involves this, that in case of an annuity payable under a covenant without any charge it is clear that the payer would not be entitled to deduct income tax. That would mean double taxation, if a charge be essential. A payment in the nature of an annual payment may be deducted apart from the question whether, under the particular circumstances, there is a charge. It is submitted however that having regard to the terms of the deeds all the premiums are potentially charged on the mortgaged property, and can be recovered out of it. There is clearly a charge in equity. It is said that the scheme of the Income Tax Acts is such that no annual payment may be deducted in respect of abatement of super-tax when the income tax cannot be deducted by the payer. There is nothing to justify that contention.

The real test is whether the income is fettered with an obligation to pay out annual sums. Where you have a fixed sum payable by instalments that is a payment of capital. When a sum is payable for life or years, that is an annual payment: *Chadwick* v. *Pearl Life Insurance Co.* (2)

What is the difference between the premiums and the interest which Lord Howe has covenanted to pay? Sometimes instead of taking out a life policy and covenanting to pay the premiums a lump sum is insured and added to the mortgage, interest being paid upon the whole. Clearly in that case deduction would be allowable. If so, how does such a payment differ from the premiums? Before Lord Howe receives his income it is fettered by an obligation to pay the interest and the premiums, and both are alike deductible.

These premiums are annual payments which constitute a fetter on Lord Howe's income, and in that sense they are

(1) [1914] A. C. 483, 494. (2) [1905] 2 K. B. 507, 512.

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"reserved or charged" upon it. They are also payments whereby the income "is or may be diminished." Ordinary payments out of income cannot be said to diminish it. After its receipt the application of the income is immaterial for purposes of taxation. If before receipt a portion of it is allocated to obligatory payments then the income is not free. The real amount of Lord Howe's income is what is left to him after satisfaction of his legal obligation. If the contrary view be taken it leads to double taxation. The income is fettered by two annual sums, one in respect of interest and the other in respect of the premiums, both of which he is bound to pay, and is entitled to deduct when computing his liability to super-tax.

T. H. Parr in reply.

Cur. adv. vult.

April 16. SWINFEN EADY M.R. The Commissioners of Inland Revenue appeal from a judgment of Sankey J., whereby he allowed an appeal upon a case stated by the Commissioners for the Special Purposes of the Income Tax Acts, and remitted the case to the Special Commissioners. In so deciding the learned judge acted contrary to his own view, but considered that it was his duty to follow a decision on the same point of a majority of the judges of the King's Bench Division in Ireland.

The point which has to be decided arises in this way: Earl Howe is tenant for life of certain settled estates, and in order to raise money has conveyed his life estate by way of mortgage, including in the security certain policies on his life, in respect of which he has covenanted to pay the assurance premiums.

In calculating Earl Howe's income for super-tax purposes, it is not disputed that he is entitled to deduct from his gross income the interest payable on his mortgages. He claims, however, also to deduct the annual premiums payable in respect of his life policies; the Inland Revenue Commissioners deny that he has any right to make this deduction, and whether he is so entitled or not is the question to be decided.

Earl Howe, in support of his claim to make the deduction, relies mainly upon s. 164 and s. 190, Sched. G, r. xvii., of the Act of 1842. Super-tax was imposed by the Finance (1909–10) Act, 1910, as an additional duty of income tax, and by s. 66 (2.) of that Act for the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemption or abatement under the Income Tax Acts.

The right to deduct life assurance premiums, as such, for super-tax purposes, was taken away by the Finance Act, 1916, s. 36 (1.), but the claim to deduct is based upon these premiums being at all events "annual payments" and as falling within the language of s. 164 of the Act of 1842. That section provides that every person claiming to be entitled to exemption shall deliver to the assessor a notice of his claim to exemption, together with a declaration and statement setting forth the sources of his income, and the particular amount arising from each source, "and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished."

By s. 190 it is enacted that the Sched. G, with the rules and directions contained in it, shall be observed in making returns of the amount of annual value or profits on which any duty is chargeable under the Act, so far as the same are respectively applicable to the case of each person. Sched. G, r. xvii., is headed: "Lists, declarations, and statements of discharge, or in order to obtain exemptions. Third: Declaration of the amount of interest, annuities, or other annual payments to be made out of the property or profits assessed on the claimant, distinguishing each source."

The contention on behalf of Earl Howe is that the annual premiums on the policies are "annual payments," and that they have to be made out of the profits brought into charge, and are charged thereon. And they are charged on his income in this manner, that if he fails to pay the premiums in accordance with his covenant, his mortgagees have power

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to pay the same and resort to the security for what they shall so pay. It cannot be disputed that these annual premiums are, in one sense, annual payments; but the question is, are they annual payments within the meaning of s. 164? The Inland Revenue Commissioners contend that no annual payment is within the section unless the payment is one in respect of which the person paying can deduct from it the income tax he may have paid in respect of it, and so pass on the burden of the tax to the recipient of the income. Of course premiums on life insurance must be paid in full to the assurance company, and no deduction therefrom on account of income tax is permissible. On the one hand interest, from which tax has been deducted, will form part of the income of the payee, and will have to be treated by him as part of his income. Unless the payer could deduct the interest from his income the result would be that such income would be subjected to double taxation. On the other hand premiums of life assurance paid to an assurance company are not subject to assessment as annual payments, although they doubtless form items in an account upon which the gains and profits of the assurance company for the year are to be arrived at.

Now s. 164 is one of a series of sections, beginning with 163 and ending with 170, dealing with exemptions and the mode of claiming exemption.

Under s. 163, any person charged or chargeable to income tax, either by assessment or by way of deduction from any rent, annuity, interest, "or other annual payment" to which he may be entitled, whose aggregate annual income estimated according to the several rules and directions of the Act is less than 150*l.*, shall be exempted from the duties of income tax, and shall be entitled to be repaid the amount of all deductions or payments, except so much of such duties as the person claiming such exemption may be entitled to charge against any other person or to deduct or retain out of any payment to which the claimant may be liable.

The next, s. 164, prescribes the mode for proceeding on any such claim of exemption. I am of opinion that s. 164 does

not confer any new right but merely prescribes the mode for carrying into effect the exemption granted by s. 163. If this be the true construction of s. 164 it follows that no deduction can be made in respect of "any sum of annual interest or other annual payment reserved or charged thereon" which is not authorized by some rule or direction of the Act—or, in other words, which is not an annual payment subject to income tax.

Moreover, this construction of the Acts leads to a reasonable result. In the case of a mortgage of a life estate, the interest on the money lent is payable out of the income of the estate, but on the cesser of the life estate there would be no further funds either to keep down future interest, or to repay the principal, were it not for the policies on the life of the tenant for life. The premiums are, in effect, annual contributions towards a sinking fund; the sums assured by the policies form a fund to repay the loan on the dropping of the life, with the additional advantage that even if the life drops prematurely and before the ordinary expectation of life is exhausted, yet the policy moneys become presently payable, and available to discharge the principal of the loan. Although the premiums on the policies are payable annually, they are not in the nature of income payments, and Earl Howe is not entitled to deduct the amount of them in estimating his income for the purposes of super-tax.

I agree with the opinion of Palles C.B. in the Irish High Court of Justice, who delivered a dissenting judgment, and also with the opinion which Mr. Justice Sankey would himself have given effect to if he had not considered himself bound by the judgment of the majority in the Irish Court.

I am of opinion that the appeal of the Inland Revenue Commissioners should be allowed and the decision of the Special Commissioners restored.

WARRINGTON L.J. The question in this case is whether Earl Howe is entitled, in estimating the amount of his total income for the purpose of super-tax, to deduct annual sums paid as premiums on policies of assurance on his own life

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pursuant to covenants contained in mortgages of his life estate coupled with such policies of assurance. Sankey J., contrary to his own opinion, but in deference to that of a majority of the judges in the King's Bench Division in Ireland, expressed in a case of *Lord Massy* v. *Inland Revenue Commissioners* (1), has given judgment in favour of Lord Howe's claims. The Commissioners of Inland Revenue appeal.

There are two mortgages of the life estate and policies; in each case the mortgagor covenants to pay the premiums. In one of them power is given to the mortgagees in the event of default on the part of the mortgagor to pay the premiums, and any moneys so expended are to be a charge on the mortgaged premises. In the other case the charge is "of all money hereby covenanted to be paid by him." The effect of the two provisions is substantially the same, namely, that if default is made and the mortgagees pay, they will be entitled to a charge. In fact, Lord Howe has regularly paid the premiums, and none of them have so far become actually charged on the life interest.

Under s. 66 (2.) of the Finance (1909–10) Act, 1910, for the purposes of super-tax the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts. No deduction is now allowed, as it was originally, for premiums on policies upon the individual's own life or that of his wife.

The sections of the Income Tax Act, 1842, relating to exemptions and abatements are ss. 163 and 164. The material part of s. 163 is as follows. [The Lord Justice read the section, and continued:] The mode in which the claim for exemption or abatement is to be made is provided for in s. 164. [The Lord Justice read the section, and continued:] The form there referred to is described in Sched. G, s. 190, r. xvii., which is headed: "Lists, declarations, and statements

(1) [1918] 2 K. B. 598 (*n.* 2).

of discharge, or in order to obtain exemptions," and the third head is as follows: "Declaration of the amount of interest, annuities, or other annual payments to be made out of the property or profits assessed on the claimant, distinguishing each source."

I agree with Kenny J. and Palles C.B. that the only deductions which can be made are such as are authorized by some direction of the Act. The obvious object of the provisions I have read is to ascertain the amount of income which but for the exemption would be chargeable with tax. Prima facie a man is chargeable in respect of all the income he receives and the mode in which he expends it is immaterial. But there are certain payments which are in the first instance treated as included in his own income for the purpose of assessment on him, but the tax on which he is entitled to retain on making the payment to the recipient, with the result that the tax is ultimately borne and paid by the latter. These payments are part of the taxable income of the recipient, and not of the person who makes them. (See s. 102 of the Act of 1842 and s. 40 of the Act of 1853.) There may also be annual payments, the amount of which is not even in the first instance included in the taxable income of the payer, but which are subject to tax in the hands of the recipient. An example of such a payment is to be found in *Hill* v. *Gregory*. (1)

In my opinion the annual payments referred to in s. 164 and in s. 190, Sched. G, r. xvii., are those, and those only, which for taxation purposes are treated as income not of the payer but of the recipient, in respect of which the latter has to bear the duty. Do the annual payments in question fall within this category? In my opinion they do not. They are clearly not annual payments within s. 102 of the Act of 1842 or s. 40 of the Act of 1853. They are in truth instalments of purchase money for a capital sum payable on death. They go no doubt to swell the profits and gains arising or accruing to the assurance company on which income tax is chargeable, but the tax is not charged on the premiums themselves.

(1) [1912] 2 K. B. 61.

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In this respect there is a clear distinction between interest payable under the mortgage and the amount of the premiums. The interest is within the express terms of s. 102 of the Act of 1842 and s. 40 of the Act of 1853, and the person liable to pay is entitled to deduct the tax on making his payment.

Warrington L.J. Having regard to the view I take as to the meaning of the expression "annual payments" in s. 164, it is unnecessary to decide whether, if the payments in question were such annual payments, they could be said to be "reserved or charged on the income whereby the income shall, or may be, diminished." If these words are to receive a strict interpretation, the sums paid for premiums are not either reserved or charged on the income. Any sums which the mortgagees may pay would no doubt be so charged, but, so long as the mortgagor pays, the income is not subject to any charge in respect thereof. But I think these words are not used in a strict sense. If they were they would exclude for the purposes of exemption annual payments made in pursuance of a personal obligation as to which, under s. 102, the liability to the tax is cast on the payer. Moreover, any annual sum charged in the proper sense upon income diminishes that income, and if such a sum alone were referred to, the words "whereby the income shall, or may be, diminished" would be unnecessary. Again in s. 190, Sched. G, r. xvii., the expression used apparently in reference to the same subject-matter as that referred to in s. 164 is "out of" and not "reserved or charged on" the income. I think the words now in question are used in what I may call an income tax sense, that is to say, they connote all annual sums which, though in the first instance treated as included in a man's income, are not part of it for taxation purposes, but are for these purposes part of the income of the recipient. If, therefore, contrary to the view I have expressed, the amount of the premiums could be treated as an annual payment within the section, the words "reserved or charged thereon" would not prevent their being deducted.

The result is that, in my judgment, the appeal should be allowed and the decision of the Commissioners restored.

This gives effect to the opinion of Sankey J., although the order made by him is reversed.

SCRUTTON L.J. Lord Howe has an income from various sources which renders him liable to super-tax. He has also, through family circumstances immaterial to the present case, to pay interest on borrowed money, and to pay premiums on policies of insurance effected to provide a security for his loan. He claims to deduct from his income, in order to ascertain the amount on which he should pay super-tax, the annual interest which he pays on the loans, and the premiums on the policies. The Crown, for reasons appearing hereafter, admit his claim to deduct interest, but object to his claim to deduct premiums, and he was assessed on these lines. On appeal Sankey J., against his own view, but following the views of the majority of the Irish Court of King's Bench, Palles C.B. dissenting, allowed the deduction of premiums. The Crown appeals.

Under s. 66 of the Finance Act, 1910, the income liable to super-tax is to be the total income of the individual from all sources for the previous year estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts.

By present legislation however insurance premiums cannot be deducted in ascertaining the amount of super-tax (Finance Act, 1916, s. 36, sub-s. 1). The respondent therefore must found his claim to deduct on some other quality of the payments, and I understand that he endeavoured to do so, by referring to s. 164 of the Act of 1842, and asserting that the premiums were annual payments reserved or charged on his income or the sources thereof whereby the income would or might be diminished, and he was therefore entitled to deduct them. The facts as to the premiums are these: By a deed of 1894 Lord Howe, then Viscount Curzon, assigned to trustees certain policies of assurance on his own life, and covenanted that he would pay the premiums thereon, and if the policies lapsed would effect substituted policies, and that his life estate should stand charged with all moneys

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covenanted to be paid "to" (which it was agreed should be "by") him. The payment of premiums was therefore secured by a charge on the life estate. The premiums have always been paid.

Under a second deed of 1902 Lord Howe mortgaged amongst other things three policies of assurance, and covenanted that he would keep in force the policies or others substituted for them; that he would pay the premiums, and that if he failed to do so the lender might pay the premiums, whether on the original or substituted policies, the cost of which to the lenders should be a charge on the life estate. It will be seen that this charge is for sums paid, if any, on the failure of Lord Howe to keep up the policies, and need not be for the amount of the original premiums, but may be for more or less. All these premiums have been paid by Lord Howe.

Sect. 164 of the Act of 1842, on which the respondents rely, is merely a machinery section, prescribing the method of making a claim to the exemption given by s. 163 and later sections. To understand its language one must remember that Sched. D in the Act of 1842 did not contain any express provision for charging "interest of money, annuities and other annual profits and gains not charged by virtue of any of the other schedules," such as was subsequently inserted in Sched. D in the Act of 1853. The charging section in the Act of 1842 for interest and annuities was s. 102, which provides (1.) that "annuities, yearly interest of money, or other annual payments," whether charged on property of the person paying or reserved thereout, or due as a personal debt or obligation under a contract, shall be charged to income tax. Whether the annual payment was or was not a charge on the property was therefore immaterial. (2.) That if the annual payments are payable out of profits and gains brought into charge, the receiver of the annuity, etc., shall not be assessed, but the payer shall be assessed and authorized to deduct a proportionate amount of tax from the receiver, who must allow the deduction, as payment of a corresponding amount of the sum due to him. (3.) That where the payment is made out of profits and gains not brought into charge the assessment shall

be made on the person receiving the profits according to case 3 of Sched. D. There was machinery in s. 104 for making the deduction, but the machinery was made more effective by s. 40 of the Act of 1853, and s. 24 (3.) of the Act of 1888 (51 & 52 Vict. c. 8), as explained by Lord Macnaghten in *London County Council* v. *Attorney-General.* (1)

This being in 1842 the charging section on annual payments, s. 163 provided for total exemption from duties of a person chargeable to duties, either by direct assessment, or because a payer of interest to them was entitled under s. 102 to deduct it from their assessment, who proved that his annual income, estimated according to the rules and directions of the Act, was less than 150*l.*, and further provided that he should be entitled to be repaid any deductions made from him, except such as he could deduct from another person. Now the rules and directions of the Act forbade any deductions. See, for instance, r. 4 of the first case of Sched. D. "In estimating the amount of profits and gains no deduction shall be made on account of any annual interest or any annuity or other annual payment, payable out of such profits or gains." Lord Howe would therefore be bound to bring into his assessment for Sched. D the amount of his "annual payments." The same thing is said in s. 159, which provides that no deduction shall be made on account of any annual interest, annuity, or other annual payment "in regard that a proportionate part of the duty so to be charged is allowed" (by s. 102) "to be deducted on making such payments." See *Alexandria Water Co.* v. *Musgrave* (2); *Gresham Life Assurance Society* v. *Styles.* (3)

Sect. 164 then provides for the mode of claiming exemption. The claimant is to deliver in the "form" provided by the Act (which refers to s. 190, Sched. G, r. xvii.) a declaration setting forth the sources of his income and the receipts from each source, "and also (1.) every sum of annual interest or other annual payment reserved or charged thereon whereby the income shall or may be diminished"; and also (2.) any sum which he may be entitled to charge against another

(1) [1901] A. C. 38-40. (2) (1883) 11 Q. B. D. 174.
(3) [1892] A. C. 309.

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person ; or (3.) to deduct from any other person. Heads (2.) and (3.) refer to the amounts of tax which under s. 163 he cannot recover because he can deduct it from another person. The reason for head (1.) is not expressly stated ; but I think it must mean the provision of means of calculating deductions from income to obtain exemption, and must involve an authority to deduct those sums from the total income to get the income for the purpose of exemption. It will be noticed that the claimant is not required to return "the sums payable as a personal debt or obligation by virtue of any covenant," though s. 159 uses general words covering them. When one seeks further light from the "form" prescribed in s. 190, Sched. G, r. xvii., the first and second heads give the total amount of income for which the claimant is either (1.) assessed or (2.) has to allow deduction of duty by others who are assessed ; (3.) is the amounts he can deduct from the total of (1.) and (2.) ; (4.) gives the sum arrived at by deducting head (3.) from heads (1.) and (2.). Head (5.) is apparently to inform the revenue as to other persons who have income from which tax is deducted at the source.

The result of these sections seems to be that the "annuities interest and other annual payments" which can be deducted to obtain exemption are those from which the claimant can deduct tax on behalf of the recipient. Being in effect the profits of the recipient who bears the tax, they are not also to be treated as profits of the person paying them. If no tax can be deducted on behalf of the recipient, they cannot be treated as profits of the recipient, and must be treated as paid out of profits of the person paying, who is therefore to be taxed on them.

It is not all payments made every year from which income tax can be deducted. For instance, if a man agrees to pay a motor garage 500*l.* a year for five years for the hire and upkeep of a car, no one suggests that the person paying can deduct income tax from each yearly payment. So if he contracted with a butcher for an annual sum to supply all his meat for a year. The annual instalment would not be subject to tax as a whole in the hands of the payee, but only that part of it which was profits. I never heard the suggestion

that income tax could be deducted from premiums on a life policy till I saw it in the judgments of Kenny J. and Madden J. in the Irish case of *Lord Massy* v. *Inland Revenue Commissioners* (1), and I respectfully concur with Palles C.B. in disapproval of the suggestion. As said by Bramwell B. in *Foley* v. *Fletcher* (2), it cannot be taken that the Legislature meant to impose a duty on that which is not profit derived from property, but the price of it. These premiums are either payments of capital to obtain on the death a sinking fund — the policy moneys — or the price of such a payment or fund. They do not seem to me to be annual payments ejusdem generis with annual interest or annuities, and as income tax on them cannot be deducted against the recipient, I see no reason why the person paying should deduct them from his taxable income. To allow this would be to establish a kind of profits which would escape taxation in the hands of the person paying because he could deduct it as an annual payment ; in the hands of the recipient because it did not represent his profits. From this point of view it is immaterial whether the payment is charged or not ; it is not an "annual payment" within ss. 102, 163 or 164.

In taking this view I am agreeing with what would have been the view of the judge below, but for the Irish decision. I have considered the matter independently and come to the same conclusion as Palles C.B., with whose judgment I respectfully concur. I think also the result of this decision is in accordance with the intention of the Legislature when they refused to allow any premiums as such to be deducted in getting at the income assessable to super-tax.

In my view the appeal should be allowed with costs, and the assessment of 26,651*l.*, not including interest, but including premiums, restored.

Appeal allowed.

Solicitor for appellants : *Solicitor of Inland Revenue.*
Solicitors for respondent : *Trower, Still, Parkin & Keeling.*

(1) Post, p. 354 *n.* (2) (1858) 3 H. & N. 769, 783.

G. A. S.

C. A. [In the High Court of Justice in Ireland. King's Bench Division.

1919 LORD MASSY *v.* COMMISSIONERS OF INLAND REVENUE.(1)

Earl Howe *v.* Inland Revenue Commissioners.

The following are the judgments of the majority of the Court. The dissenting judgment of Palles C.B. will be found in the report of the case below. (1)

1915. July 29. Kenny J. This case, stated by the Special Commissioners of Income Tax, raises the question whether Lord Massy, in computing the amount of his income from all sources for the purposes of super-tax, was entitled to a deduction from such income of premiums on certain policies of insurance effected on the life of his son, the Hon. Hugh Somerset Massy, and which premiums Lord Massy had, as surety for his son, covenanted to, and did, pay. The latter by mortgages, dated May 31, 1907, and August 22, 1910, had raised moneys on mortgage of his life estate in settled property, and had further secured the debts by policies of insurance on his life. Lord Massy was a party to the mortgages, and thereby covenanted with the lenders to pay the interest on the loans and the premiums on the policies in case of non-payment by his son. The latter was adjudicated a bankrupt in December, 1908, and never made any payment of interest or premiums in respect of the mortgages, and Lord Massy had been obliged to pay the same.

It does not appear from the case whether Lord Massy deducted or sought to deduct from the mortgagees income tax on periodical payments of the interest, but it was stated in the course of the hearing before us by an official of the Inland Revenue that, so far as the interest was concerned, Lord Massy got credit for it in his return for assessment to super-tax, but his further claim for a deduction of the premiums was opposed, and he was accordingly assessed on their amount. That assessment was confirmed by the Special Commissioners, who, pursuant to 43 & 44 Vict. c. 19, s. 59 (1), stated the present case on the application of Lord Massy.

The tax called super-tax was first imposed by the Finance (1909–10) Act, 1910 (10 Edw. 7, c. 8), s. 66, which provides for an assessment at the rate therein mentioned on incomes the total of which from all sources exceed 5000*l.* a year, and for the purpose of this tax it was thereby declared that the total income of any individual from all sources should be taken to be the total income of that individual from all sources for the previous year, estimated in the "same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts." So that in order to ascertain the amount of the total income assessable to super-tax we are thrown back on the Income Tax Act of 1842 (5 & 6 Vict. c. 35), extended to Ireland by the Income Tax Acts of 1853 (16 & 17 Vict. c. 34), s. 5, which contains the provisions for exemptions and abatements. The chief exemption dealt with by that Act is conversant with annual incomes of less than 150*l.*, now 160*l.*, under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 34. The exemption is given by s. 163. The income chargeable with the tax is referred to as the income of "person charged or chargeable to the duties granted by this Act, either by assessment or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled"; and, for the purpose of exemption, the aggregate amount of the income is to be estimated according to the

(1) [1918] 2 K. B. 598 (*n.* 2).

several rules and directions of the Act. Inasmuch, therefore, as the claims for exemption must come within either a case of direct assessment or one of deduction, and as the income of the party seeking exemption is to be estimated in accordance with the rules and directions of the Act, the provisions applicable to the ascertainment of income must be considered.

The principle of the Income Tax Acts is most concisely stated by Lord Haldane L.C. in the opening paragraph of his speech in *Sugden* v. *Leeds Corporation*. (1) The first section of the Act of 1842 created a charge in favour of the Crown on the several species of property set forth in the Schedules A, B, C, D, and E, which are tolerably well known to every taxpayer. It is scarcely necessary to say that the duties coming within those charges are duties payable by the recipients of income, whether the latter is derived from the profits of land or Government securities or consists of the annual profits and gains from any kind of property or from any profession, trade, or employment, or of annuities, yearly interest of money or other annual payments. The recipient of income may, on the other hand, also be liable to the payment of annual interest for an annuity or some other annual sum, and, in such a case, it is provided that in estimating the amount of the income of the person assessed no deduction is to be made in respect of such annual outgoings (s. 100, fourth rule of first case, third rule of second case). But it is clear that such provision does not and could not mean that the payer of such sums was not in any event to get credit for them or that he was ultimately to bear the income tax imposed on them in the first instance. The Act speaks of "profits and gains" as constituting taxable income, and it would be almost a contradiction in terms to apply this expression to a case where the annual outgoings might absorb what otherwise would be "profit or gain." If the section be read in connection with s. 102 it is manifest that the object of the Act was to tax income at its source, and in the case of such payments to make use of the payer as intermediary for the Revenue, and by taking the tax on such payments from and through him instead of from the person upon whom the real liability is thrown, namely, the recipient, to thereby satisfy the Crown charge and leave it to the payer and recipient to work out between themselves their mutual rights and obligations. This is done by assessing the tax on the whole of the payer's income, regardless of these outgoings, and by giving him relief, through the medium of s. 102, which enables him to recoup himself the amount of the tax on the outgoings from the recipient of it. This section, the terms of which are largely repeated in s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), provides that duty shall be charged on all annuities, yearly interest of money, or other annual payments, whether the same be payable "either as a charge on any property of the person paying the same by virtue of any deed or will or otherwise, or as a reservation thereout, or as a personal debt or obligation by virtue of any contract, or whether the same shall be received and payable half yearly or any shorter or more distant period." Then follows a proviso that when the same shall be payable out of profits or gains no assessment shall be made upon the person entitled to such annuity, interest, or annual payment, but the whole of such profit or gains shall be charged with duty on the person liable to such annual payment, "without distinguishing such annual payment," and such person in his turn is to be at liberty to deduct from the recipient

(1) [1914] A. C. 483.

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of the annual payment the amount of the duty so assessed on him in the first instance. This scheme carries out the policy of the Act in several particulars. It gives the Crown its duty; it taxes the income at the source; it throws the burden on the right shoulders—namely, those of the recipient—and, by recoupment, it relieves the taxpayer from duty on any outgoings coming within the meaning of the section, and recognizes his liability for tax on net income only. The idea is further carried out, though by rather a cumbrous procedure, by s. 104, modified by s. 40 of the Act of 1853, which directs that when the person liable to certain of these annual payments has made the payment without having deducted the duty, the Commissioners of Income Tax may grant a certificate thereof which shall entitle the payer to recoupment from the payee. In practice s. 102 would work out thus: A. has a taxable income of 1000*l.* a year which is subject to an admittedly annual payment of 100*l.* to B. A. pays duty at 1*s.* in the *l.* on his 1000*l.* a year amounting to 50*l.* A. is thus out of pocket 5*l.*, inasmuch as his net income would be only 950*l.*, and accordingly he pays to B. only 95*l.* instead of the 100*l.*, and thus recoups himself the 5*l.*, and B. bears his legitimate burthen. If B. had already made a return of his income, and had included in it the annual sum receivable by him, and had paid the tax on it, the relations between him and A. and the Revenue authorities would have to be adjusted, inasmuch as the Crown is not to be paid twice duty, and the income tax payer is not to be called on to pay more than once.

I have examined these sections of the Act of 1842 in perhaps more detail than was absolutely necessary for the purpose of arriving at the true construction of ss. 163 and 164, dealing with exemption, but s. 102 is largely the foundation of the latter, and without a true perception of its scope and operation it would not be possible to understand the exemption sections. Sect. 163 takes the case of a taxpayer who has either paid his tax directly to the Crown through the medium of direct assessment or has had it deducted from him for purposes of recoupment when and so far as his income consists of an "annuity, interest or other annual payment." Where such a taxpayer, that is, such a recipient of income, is able to establish "in the manner hereinafter mentioned that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act," is less than 150*l.*, the section enacts that he is to be exempted from tax, and is to be entitled to be repaid the amount of all deductions or payments on account thereof. Two matters are to be noted in connection with this provision—namely, that the amount of the income is to be estimated in accordance with the "rules and directions" of the Act, and that the mode of establishing the claim to exemption is that which is subsequently pointed out. I think that the result of this provision is that, notwithstanding the language of the following section, s. 164, which has been so much relied on, no deduction can be made from gross income for the purpose of bringing the net income below 150*l.*, which is not sanctioned by some rule or direction contained in the Act, or, to put it in a more concrete form, which would not be admissible in an ordinary return of income or by way of deduction as against a recipient of a yearly one. In my opinion the language of s. 163 is unambiguous on this point. The next section, s. 164, deals with the mode of claiming exemption. The claimant is to deliver with the notice of his claim a statement setting forth the sources of his income and the amount arising from each

source, " and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished, and also every sum which such claimant . . . . may be entitled to deduct or retain, under the authority of this Act, from or out of any payment to which he may become liable." This is followed by s. 190, which provides, through the medium of Sched. G, for the observance of certain " rules and directions " by persons making returns. The seventeenth of those rules deals with returns for the purpose of obtaining exemptions, such returns being conversant with declarations as to receipts in respect of which duty is deductible and payments which the claimant makes out of the property or profits, or which he may be liable to make. It does not seem to me that either s. 164 or those rules enlarge the area of deduction, which, so far as the present case is concerned, is, in my opinion, governed by ss. 102 and 163. Sect. 164 will be found, on close examination of its terms, to extend merely to the mode in which the claim for exemption is to be made, while s. 163 is emphatic in its declaration that the income is to be estimated according to the several rules and directions of the Act, which, in my judgment, simply means in accordance with the general provisions of the Act. Rules and directions in that section cannot be referable merely to the " rules and directions " in Sched. G.

The question then comes to this: Do the premiums on the policies which Lord Massy pays come within the category of statutory deductions to which the payer of the outgoings has a statutory right ? The first important element is that of obligation. As between Lord Massy and his son's creditors, these premiums constitute a personal debt or obligation of the highest character. They are secured by the debtor's covenant singly or in the aggregate. They constitute an annual payment, and their payment diminishes the income of the payer. They are not specifically charged on or reserved out of the claimant's property, but they are very effectively payable out of the claimant's general income, which can be, in the last resort, made available for the purpose of discharging his obligation. It is admitted by the Revenue authorities that the interest on the mortgages is properly deductible, and that Lord Massy has been allowed credit for it. I am unable to appreciate any real distinction between the two classes of liability, notwithstanding the argument that the premiums are in substance part payments of capital sums, and, therefore, not liable to income tax. I cannot agree that they represent capital in the sense which repayments of purchase money by means of annuities or yearly payments have been held to be untaxable. It is a little difficult to work out the actual effect of the Income Tax Acts, but I find it impossible to give an answer to the following proposition. The interest on the mortgage is part of the mortgagee's income, and has to be returned as such by the insurance company who are the mortgagees. Surely the premiums on policies of insurance issued by them, no matter by whom paid, are also part of the taxable income, and presumably the Crown has received the duty from the company as the recipient of that income. Lord Massy is the payer of that portion of the insurance company's income; having paid income tax on his entire income without any deduction for the premiums, the Crown will, as it seems to me, be receiving a double payment, one from the recipient and one from the debtor, if the premiums be excluded from the class of deductible annual payments resulting from " a personal debt or obligation by virtue of any contract " within the meaning of s. 102. I cannot think that they are excluded so long as they take the form of an

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enforceable obligation. The test of liability would have arisen if Lord Massy, having been in the first instance assessed on his whole income without deduction, had, in accordance with the right conferred by s. 102, thereupon deducted the tax from his periodical payments of the premiums to the company. If such a deduction would have been legitimate then it follows that his income should be treated for purposes of exemption as diminished by the amounts of those payments.

In my opinion these premiums, whether, in the words of s. 102, they be "received and payable half yearly or at any shorter or more distant periods," are annual payments and personal debts arising from contract within the meaning of that section. They are as much annual payments as interest on money which is specifically referred to in the enactment, and, in my judgment, Lord Massy, on being assessed on his whole property, would have been entitled to recoup himself from the insurance company so much of the income tax paid by him as was referable to the premiums. No doubt they are not payable in respect of insurance on his own life or on that of his wife within s. 54 of the Income Tax Act of 1853, but that does not affect their quality as compulsory outgoings. It was strongly contended that a premium of this character was a mere payment of a capital sum, and, therefore, not taxable, and cases such as *Foley* v. *Fletcher* (1) were relied on. No doubt, as was stated in the *Nizam's Case* (2), the annuity or annual payment may be analyzed in order to see if it or any part of it represents capital; and in *Foley* v. *Fletcher* (1) the Court was satisfied that, inasmuch as the yearly payment represented instalments of the purchase money of an estate, it should be regarded as capital. To the same effect is *Secretary of State in Council of India* v. *Scoble* (3), where an annuity was substituted for a gross sum. On the other hand payments for the creation of a sinking fund have been held to be taxable income, although the sinking fund may result in being a capital sum. *Mersey Docks* v. *Lucas* (4) and the *Nizam's Case* (2) were cases of sinking funds. In *North British Ry. Co.* v. *Duke of Abercorn* (5) the Court dealt with the contention that an annual sum payable by the Duke of Abercorn to the company was in reality a repayment by instalments of a capital sum, and, therefore, not taxable. The annual sum in that case consisted of a sum at the rate of 3 per cent. per annum on the price paid by the company to the tenants on the occasion of the purchase of an estate from the Duke of Abercorn. The tenants were to continue to pay their rents in full, and the annual sum was to be paid during the currency of the leases. The Court, on the facts, held that the 3 per cent. on the purchase money was not a payment of capital but was simply an annual sum payable by contract and within s. 102, and they distinguished *Foley* v. *Fletcher*. (1) In *London County Council* v. *Attorney-General* (6) Lord Macnaghten says that s. 102 "extends to all annual payments," but, having regard to *Scoble's Case* (3), it is clear that the generality of that statement is subject to restriction.

On the whole I am of opinion that no part of these premiums can be said to consist of capital although the payment may provide a capital sum, that the decision of the Special Commissioners in this case was erroneous

(1) 3 H. & N. 769.
(2) (1890) 24 Q. B. D. 548.
(3) [1903] A. C. 299.
(4) (1883) 8 App. Cas. 891.
(5) (1879) 17 Sc. L. R. 270.
(6) [1901] A. C. 38.

in point of law, and that the appellant, Lord Massy, was entitled to the credits which he claimed.

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MADDEN J. Two exceptions have been engrafted on the general system of taxation of income which was established by the statutes 5 & 6 Vict. c. 35, and extended to Ireland by 16 & 17 Vict. c. 34.

Of these exceptions one is in favour of persons who, by reason of the narrowness of their means, are deemed to be entitled to exemptions from this form of direct taxation. By the other exception persons estimated to be of abundant means are rendered liable to contribute more liberally to the revenue of the State by the imposition of what is known as super-tax. The statutory procedure by which the means are ascertained for the purpose of exemption from super-taxation is, as might be expected, in both cases the same.

I have adopted the term "means," for it expresses in popular language the kind of income which is arrived at by this statutory procedure, and suggests the reason why the income so ascertained was regarded as the proper subject-matter of exemption in one case and super-taxation in the other.

Exemption is dealt with by s. 163 of 5 & 6 Vict. c. 35. A person may be charged with income tax in either or both of two ways: (1.) by assessment on the income received by him, and rendered liable to taxation under the Act; or (2.) by deduction from any rent, annuity, interest or annual payment to which he may be entitled. Any person who has thus directly or indirectly been made liable to the payment of income tax, and "who shall prove to the Commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the rules and directions of this Act, is less than 150*l*." is exempted from liability to income tax. This exemption, which was altered by subsequent legislation, is thus worked out. (1.) He is not liable to payment of the tax assessed on his income to which, but for this exemption, he would have been liable. (2.) He is entitled to be repaid the amount which has been deducted from annual payments received by him, by which deductions his income has been made indirectly liable to the tax from which he has established a right to exemption. There is an exception to the generality of his right to repayment of sums deducted from payments to him. It does not extend to deductions which the person claiming exemption has a right to charge against some other person, upon the obvious ground that the claimant can, by the exercise of this right, exempt himself from payment of income tax in this form. This is the section by which a right to exemption is created. The subject-matter of the exemption is the aggregate annual income of the claimant to be "estimated according to the several rules and directions of this Act." For these rules and directions we turn to s. 164 and to Sched. G. Elaborate provisions are contained in this section and schedule for the purpose of ascertaining the "income" of the claimant for the purpose of the exemption contained in s. 163. This I shall call his net income. He is bound to set forth all the sources of his income, and the amount from each source, "and also every sum of annual interest or other annual payment reserved or charged thereon whereby the income shall be or may be diminished." Sched. G, r. xvii., contains specific direc[illegible]s to the lists, declarations and statements to be furnished by a claiman[illegible]der to obtain exemption. First, the claimant is to declare the amount of property or profits in respect of which

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he is liable to be assessed for income tax. Secondly, he is to show the amount of the claimant's indirect payment of duty by deduction of the tax from rents or other annual payments made to him. Thirdly, "the amount of interest, annuities or other annual payments, to be made out of the property or profits assessed on the claimant, distinguishing each source." Fourthly, a statement of the amount of income derived according to the three preceding declarations. Fifthly, a statement is to be made as to payments made by the claimant out of which he is entitled to deduct duty, and of any charge he may be entitled to make against any other persons for any portion of such duty. Numbers two to five are conversant with the right conferred by s. 163 on an exempted person to obtain payment of tax which he has indirectly paid in the form of deduction from his income, number five relates to the exception from the general right to repayment established by the section when the claimant is in a position to effect exemption by claiming against another person the whole or part of the sum which has been deducted from him.

Number three is the provision with which the present case is concerned. Reading Sched. G, r. xvii., with s. 164, I am of opinion that the deductions to be made include all annual payments which the claimant is compellable by law to make, inasmuch as by these the amount of his income may be reduced. The words of s. 164 are "annual payment reserved or charged on" the income. The word "reserved" was evidently inserted to include the case of an annual payment which the claimant was bound to make, but which was not specifically charged on his income, such as an annuity secured by a covenant. The expression is not a particularly happy one, but its meaning is explained by Sched. G, r. xvii., which does not use the word "charge," but includes all annual payments to be made out of the claimant's property. Until the claimant's legal obligations of this kind have been discharged we do not get at his net income or means, a consideration of the narrowness or amplitude of which ought to be regarded as a subject within exemption or super-taxation.

The annuity with which this case is conversant is payable to the trustees of the Legal and General Life Assurance Company, under an indenture of mortgage dated August 22, 1910. It represents the premiums on certain policies of assurance on the life of the Hon. Hugh S. J. Massy, son of Lord Massy. If there were nothing more in the case, the annual amount of these premiums could not be an "annual payment reserved or charged on" the income of Lord Massy within the meaning of s. 164 of the Act. By legislation subsequent to the Income Tax Act, an abatement was granted in respect of premiums on policies of insurance; but this abatement extends no further than to policies on the life of the payer of income tax or on the life of his wife. Policies on the life of a child are not the subject of abatement. The payment of premiums on such policies is a mode of expending income which the payer of income tax may employ if he thinks fit so to do. They are not annual payments reserved or charged on his income within the meaning of the Income Tax Acts.

The position is altogether changed if the taxpayer has entered into a contract for valuable consideration, legally enforceable, by which he is bound to pay the premiums on a policy of insurance on the life of a son or any other person. In the case before us a family arrangement was entered into by which, in consideration of money paid by the insurance company to the son of Lord Massy, who was entitled to certain settled estates after the death of his father, Lord Massy covenanted for payment of the interest on the loan from the

insurance company and also of the premiums on policies of assurance by which that loan was secured. I can see no difference in the legal position, in regard to s. 164 of the Income Tax Act, between the interest on the loan and the premiums on the policies of insurance. Both must, in the words of Sched. G, be paid before the net income can be ascertained, and are thus, in the words of s. 164, "reserved" out of the gross income. Indeed, on looking into the mortgage, I find that the premiums on the policies are specifically charged on a portion of the life estate of the claimant, that derived from the proceeds of lands sold under the Land Purchase Acts; but this, in my opinion, is immaterial. I rest my judgment on the premiums constituting the annual payment which the claimant is bound to make under a contract for valuable consideration, and which is a proper deduction in ascertaining net income under the provisions of the Income Tax Acts. In *Scoble* v. *Secretary of State in Council of India* (1) the meaning of the word "annuity" in Sched. G of the Income Tax Act was considered by the House of Lords. It was there decided that where a sum due to the Secretary of State for the purchase of railways under the terms of the contract was to be paid off in annual payments, which in the aggregate would be equivalent to the principal sum and interest, the annual payments, so far as they represented principal, were not chargeable with income tax. If this were not so income tax would be payable on capital and not on income. This case was conversant with the meaning of the word "annuity" as the subject of taxation, and it is founded on the proposition that capital is not the subject of taxation in the Income Tax Acts. I do not think that the decision governs the present case, for it is not suggested that the premiums on the policies of insurance, irrespective of the contract between Lord Massy and the insurance company, could be the subject of deductions. The present case is conversant with the meaning of the words "annual payment" in s. 164, and "annuities or other annual payments" in Sched. G as deductions from the "income" (s. 164) or "the property or profits assessed on the claimant" for exemption (Sched. G). Certain classes of annual payments are modes of expenditure of the income of the claimant. Into this class would fall the payment of premiums on a policy of assurance on a life other than the claimant's or his wife's, which have been made the subject of special exception. The question in the present case seems to me to be not the nature or origin of the annuity or annual payments, but whether it comes within the words "reserved or charged thereon whereby the income shall be or may be diminished," as explained by the words which I have quoted from Sched. G, r. xvii. Bearing in mind the object which the Legislature had in view, the ascertainment of net income or means for the purpose of exemption or super-taxation, I am of opinion that the gross taxable income of the claimant is liable to be diminished, within the meaning of this section, by the annual sums which he was under a legal obligation to pay to the insurance company, whether the obligation arose in respect of the premiums on the policies of insurance or the interest on the mortgages.

(1) [1903] A. C. 299.

G. A. S.

C. A.
1919
May 26.

[IN THE COURT OF APPEAL.]

SMITH *v.* BUSKELL (BY ORIGINAL ACTION).
BUSKELL *v.* SMITH AND GREAT WESTERN RAILWAY COMPANY (BY COUNTERCLAIM).

[1919 S. 378.]

Practice—Parties—Counterclaim—Joinder of Third Party as Defendant to Counterclaim—Relief claimed against Defendants in Alternative—Joinder of different Causes of Action—Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *s.* 24, *sub-s.* 3—*Rules of Supreme Court, Order* XIX., *r.* 3; *Order* XXI., *rr.* 11, 15.

The plaintiff brought an action against the defendant for the price of goods sold and delivered, the contract being one to deliver goods f.o.r. at P. Station for transmission to the defendant at Exeter. The defendant, by his defence, pleaded, first, that the plaintiff failed to deliver the goods in good condition, and, therefore, did not fulfil his contract; and secondly, that if he did deliver them in good condition, he committed a breach of an implied term of his contract so to pack the goods that they should be reasonably fit to stand the ordinary risks of transit by rail. He also raised the same point against the plaintiff by way of counterclaim, and claimed damages. To that counterclaim he joined the G. W. R. Co. as defendants, and alleged against them that the goods having been delivered to them at P. Station in good condition, they, in breach of their duty as carriers, so treated them that when they arrived at their destination they were in bad condition; and claimed damages against them. He further pleaded that if the goods at the date of their delivery to the railway company were in a good condition he claimed to recover damages against them, and alternatively, in the event of its being found that the goods at the date of their delivery to the railway company were in bad condition, he claimed to recover damages against the plaintiff. On an application by the plaintiff, the judge at chambers refused to order that the counterclaim, in so far as it joined the railway company as defendants to the counterclaim, should be struck out. On appeal:—

Held, that the claims were not strictly alternative, so as to be mutually exclusive; but that the relief claimed against the railway company was sufficiently "connected with the original subject of the cause or matter" within s. 24, sub-s. 3, of the Judicature Act, 1873, to enable the claim against the railway company to be joined with the claim against the plaintiff.

Times Cold Storage Co. v. *Lowther & Blankley* [1911] 2 K. B. 100 distinguished.

Decision of Roche J. affirmed.

APPEAL from a decision of Roche J.

The action was brought by the plaintiff against the defendant Buskell for 233*l.* 6*s.* 8*d.*, the price of goods sold and delivered, the claim being indorsed on the writ. By the contract the goods, which consisted of about one ton of jelly cutting, were to be delivered f.o.r. at Paddington Station for conveyance to Exeter. The defendant delivered a defence and counterclaim as follows:—

"1. The defendant admits that he bought from the plaintiff under a contract contained in correspondence between the parties one ton of jelly cuttings at 2*s.* 1*d.* per pound f.o.r. Such goods were to be in all respects in accordance with a sample sent by the plaintiff to the defendant on January 14, 1919, and were to be despatched by the plaintiff to the defendant's premises at Exeter.

"2. It was an implied term of the said contract that the plaintiff should pack the same well and securely and in such a manner as to enable them to withstand the ordinary risks attaching to a journey on rail to Exeter, and that the same when put on rail should be in such a condition and so packed as to enable them to arrive at Exeter in good condition.

"3. On or about January 20, 1919, the plaintiff put on rail a quantity of jelly cuttings amounting to 1,979 lbs. No further quantity of goods has ever been put on rail or delivered to the defendant.

"4. In breach of the said contract the plaintiff failed to pack such 1,979 lbs. of jelly cuttings well and securely or in such a condition as to enable them to withstand the ordinary risks of a journey to Exeter, and the same when put on rail were in bad condition and/or were in such a condition that they would become bad in the ordinary course before delivery to the defendant.

"*Particulars.*

"The said jelly cuttings were contained in tins. Such tins were not watertight and were not packed in cases as they should have been, but were despatched loose without any precautions being taken to prevent water getting to the same or to guard against the consequences of exposure. On arrival at Exeter on or about January 24, 1919, it was discovered as

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the fact was that the contents of the said tins had become mildewed and mouldy owing to wet and exposure. The tins contained water and the jelly cuttings were loose in the tins.

"5. By reason of the premises 900 lbs. of the said jelly cuttings were unfit for sale and unmerchantable. The balance of 1,079 lbs. had to be unpacked and repacked after being cleaned, dusted and sugared; and after being so treated were worth only 1*s.* 8*d.* per lb., being 5*d.* per lb. less than the contract price.

"*Particulars.*

	£	*s.*	*d.*	£	*s.*	*d.*
To 1,979 lbs. at 2*s.* 1*d.* per lb.				206	2	11
Less 900 lbs. at 2*s.* 1*d.* ,, ..	93	5	0			
1,079 lbs. at 5*d.* ,, ..	22	9	7			
Expenses of cleaning, etc.	90	0	0			
				205	14	7
				0	8	4

"6. The defendant will claim to set off the said sum of 205*l.* 14*s.* 7*d.* against the 206*l.* 2*s.* 11*d.* which would otherwise be due to the plaintiff, and admits his liability to the plaintiff in the said sum of 8*s.* 4*d.* subject to the counterclaim hereinafter appearing, and by way of counterclaim against the plaintiff and the Great Western Railway Company

"7. The plaintiff by counterclaim repeats the allegations contained in paragraphs 1 and 2 of the defence herein, and says that on or about January 20, 1919, the defendant by counterclaim Smith (hereinafter called Smith) delivered at Paddington to the defendant by counterclaim the Great Western Railway Company (hereinafter called the Company), 1,979 lbs. of jelly cuttings in tins for carriage to Exeter.

"8. In breach of their duty as carriers of the said goods which upon such delivery became and were the property of the plaintiff by counterclaim, the company failed to take any or any proper steps to prevent such jelly cuttings being exposed to the weather, but despatched the same in open

trucks and allowed the same to stand in water during the course of their transit to Exeter between January 20 and 24, 1919 (the plaintiff by counterclaim is unable to give further particulars until after discovery).

"9. If it is found that the said goods at the date of their delivery to the company were in a good condition (which the plaintiff by counterclaim hereby alleges). The plaintiff by counterclaim claims to recover from the company by way of damages the said sum of 205*l.* 14*s.* 7*d.* (particulars of which are stated in para. 5 of the defence herein), and a further sum of 100*l.* being the estimated profit which the plaintiff by counterclaim would have made if the said goods had not been damaged in transit.

"10. Further or alternatively in the said event the plaintiff by counterclaim claims subject to the set-off hereinbefore appearing the said sums of 205*l.* 14*s.* 7*d.* and 100*l.* as damages against Smith by reason of the breach of his implied contract to pack the goods well and securely and in such a manner as to enable them to withstand ordinary transit risks.

"11. In the event of its being found that the said goods at the date of their delivery to the company were in bad condition (which the plaintiff by counterclaim hereby alternatively alleges), the plaintiff by counterclaim will claim to recover from Smith (subject to the said set-off) the said sums of 205*l.* 14*s.* 7*d.* and 100*l.* as damages for breach of contract.

"The plaintiff by counterclaim against both Smith and the company claims damages."

On May 8, 1919, the Master ordered that the counterclaim in so far as it joined the Great Western Railway Company as defendants to the counterclaim should be struck out. On an appeal to Roche J. in chambers the Master's order was reversed.

The plaintiff in the original action appealed.

C. M. Pitman for the appellant.

It is submitted that the railway company cannot be joined by way of counterclaim. Even in the case of an original action it would be wrong to join them as co-defendants, as

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the causes of action are quite separate: Order XVI., r. 4. There is no common set of facts alleged and the causes of action do not arise from the same tort. The only thing that is the same is the damage. Claims for damages against two or more defendants in respect of their several liability for separate torts cannot be combined in one section: *Sadler* v. *Great Western Ry. Co.*(1) The effect of that decision has no doubt been somewhat modified by the subsequent alteration in 1896 of r. 1 of Order XVI. following on the decision in *Smurthwaite* v. *Hannay*. (2) In *Bullock* v. *London General Omnibus Co.* (3) it was held that the joinder, in an action of tort, of defendants against whom the right to any relief, in respect of or arising out of the same transaction, was claimed, whether jointly, severally, or in the alternative, was authorized by r. 4 of Order XVI. But in *Thompson* v. *London County Council* (4), a case decided since the alteration of the rule, it was held that the causes of action against the defendants and a water company being in respect of separate torts, though the resulting damage might be the same in each case, the company could not be joined as defendants. In the cases decided since the alteration of the rule the relief claimed has been in respect of damage arising out of the same transaction: *Campania Sansinena de Carnes Congeladas* v. *Houlder Brothers & Co.* (5) In that case Vaughan Williams L.J. said: "According to my view, in a case where there is no pretence for saying that the respective causes of action, in respect of which several defendants are joined, are other than separate and distinct causes of action, the fact that those causes of action arise out of the same transaction is not a sufficient ground for allowing the defendants to be joined in the same action." *Munday* v. *South Metropolitan Electric Light Co.* (6), where all these authorities were referred to, shows that where there is no common question of law or fact, and the plaintiff really alleges a separate cause of action against each defendant, *Sadler* v. *Great Western Ry. Co.* (1) applies, and

(1) [1896] A. C. 450.
(2) [1894] A. C. 494.
(3) [1907] 1 K. B. 264.
(4) [1899] 1 Q. B. 840.
(5) [1910] 2 K. B. 354, 362.
(6) (1913) 29 Times L. R. 346; [1913] W. N. 90.

that the defendants cannot be joined as co-defendants. Here no joint claim is alleged against the appellant and the railway company. The question is as to the condition in which the appellant delivered the goods at Paddington. The defendant says as against the appellant that they were not delivered in good condition, and as against the railway company that they were delivered in good condition, but that they suffered damage in transit. It is clear that these claims are inconsistent and could not have been joined in an original action and cannot therefore be joined by way of counterclaim : *Central African Trading Co.* v. *Grove.* (1) Order XXI., r. 11, does not apply where the defendant's claim against the third person is alternative to his claim against the plaintiff, and not "along with" it : Annual Practice, 1919, p. 372 ; *Times Cold Storage Co.* v. *Lowther & Blankley.* (2)

[*W. A. Jowitt* referred to the Judicature Act, 1873, s. 24, sub-s. 3.]

It is submitted that the Court ought to exercise the discretion vested in it by Order XXI., r. 15, by ordering the counterclaim as against the railway company to be struck out.

D. C. Bartley for the Great Western Railway Company adopted the same argument, and referred to *Evans* v. *Buck.* (3)

W. A. Jowitt for the defendant Buskell. When the goods arrived at Exeter they were in a mouldy condition and had become unmerchantable. The defendant must therefore have a remedy against someone, and it is to the appellant's advantage that the matter should be disposed of in one action. The defendant has throughout admitted two possible events, either that the goods were not in good condition when they arrived at Paddington, or that having been in a good condition on reaching Paddington they became deteriorated in the course of their transit to Exeter. It is admitted that if the claims against the plaintiff and the railway company are inconsistent and mutually destructive of one another, they cannot be joined. But it is submitted that they are not, but that they

(1) (1879) 48 L. J. (Ex.) 510. (2) [1911] 2 K. B. 100.
(3) (1876) 4 Ch. D. 432.

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overlap as regards the packing. In considering the question of joinder of parties it is immaterial whether the cause of action arises from contract or tort: *Bullock* v. *London and General Omnibus Co.* (1) In a certain event both defendants to the counterclaim would be liable in this case. *Times Cold Storage Co.* v. *Lowther & Blankley* (2) is distinguishable. There there were inconsistent alternatives. In the present case the defendant might succeed both as against the plaintiff and the railway company as regards the packing. Where a person sells goods f.o.r. he must put them in such a condition that they will be able to travel without risk. It is important to consider Order XXI., r. 11, rather than Order XVI., r. 4. The defendant is uncertain whether the damage to the goods was occasioned by the defendant or the railway company or by both, and is entitled to join both of them as defendants to his counterclaim: *Child* v. *Stenning.* (3) The damage here is one damage; the injury, using the word in its wide sense, is the same. Great extra expense would be caused to the defendant if he were compelled to bring separate actions. He is setting up a counterclaim which raises a question between himself and the plaintiff "along with" other persons, namely, the railway company, within Order XXI., r. 11, and ought not to be prejudiced because he makes his claim in the alternative.

C. M. Pitman in reply.

WARRINGTON L.J. This is an appeal from an order of Roche J. refusing to strike out the defendant's counterclaim, in so far as it is a claim against the Great Western Railway Company. The plaintiff's action is for the price of goods sold and delivered, the contract being one to deliver goods f.o.r. at Paddington. The defence is, first, that the plaintiff failed to deliver the goods in good condition and, therefore, did not fulfil his contract; and, secondly, that if he did deliver them in good condition, he committed a breach of an implied term of his contract so to pack the goods that they should be reasonably fit to withstand the ordinary

(1) [1907] 1 K. B. 264, 270. (2) [1911] 2 K. B. 100.
(3) (1877) 5 Ch. D. 695, 702.

risks of transit by rail. That is the defence, and the defendant also raises that point against the plaintiff by way of counterclaim, making a claim for damages. To that counterclaim he has added the Great Western Railway Company as defendants, the allegation against the railway company being that the goods having been delivered to them at Paddington in good condition, they in breach of their duty as carriers so treated the goods that when the same arrived at their destination they were in bad condition. There is a further claim in the counterclaim covering really both grounds, because if the plaintiff had not failed properly to pack the goods the damage would not have arisen, for if the goods had been either packed in water-tight packages or the packages in which they were packed, whether water-tight or not, had been placed by the railway company in a water-tight conveyance, the goods would have escaped injury. Under those circumstances, ought this counterclaim against the railway company to be allowed? The Act of Parliament—the Judicature Act, 1873—from which the right to deliver a counterclaim is derived merely provides by s. 24, sub-s. 3, that the Courts shall have power to grant to any defendant "all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not . . . . as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose." In other words, the sub-section allows a counterclaim for relief connected with the original subject of the cause or matter, the object being that all questions as far as may be arising out of the particular transaction shall be determined in the same cause or matter.

The question we have to determine is whether the relief claimed against the railway company is so connected with the original subject of the cause or matter that it may properly be raised by counterclaim. It was admitted by Mr. Jowitt that if the two claims were really and strictly alternative, that is to say, if the defendant could only succeed against the railway

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company if he failed to prove his case against the plaintiff, or, on the other hand, could only succeed against the plaintiff by proving that which would exonerate the railway company, then the counterclaim against the railway company would be one which could not properly be raised; and with that I agree. I think that the case would come exactly within the decision of *Times Cold Storage Co.* v. *Lowther & Blankley*. (1) But he urged that it was not so here because there was one aspect of the case in which the two subjects—namely, the relief against the railway company and the relief against the plaintiff—overlapped, and that was with regard to the packing. It may be that the packing was so defective that the damage may have been caused thereby. It may also appear that although the packing was defective, yet if the railway company had taken ordinary precautions the damage would not have been occasioned. It seems to me it is impossible for us to say that there may not arise circumstances when the evidence comes to be gone into at the trial which may show that the defendant is entitled to some relief arising out of the same state of facts against both these defendants to the counterclaim—the original plaintiff and the railway company. And circumstances may arise which will render it necessary for the Court in some way to apportion the damages as between these two defendants. If that is so, then I think that there is a sufficient connection shown between the relief claimed against the railway company and the original subject of the cause or matter to enable the claim against the railway company to be joined with that against the original plaintiff. It seems to me therefore that the order made by Roche J. was correct and that this appeal ought to be dismissed, with costs.

DUKE L.J. I am of the same opinion. The decision of this appeal no doubt depends upon the true construction of s. 24, sub-s. 3, of the Judicature Act, 1873, which confers upon the defendant in an action the right to counterclaim. The direction in the sub-section is this: "All such relief

(1) [1911] 2 K. B. 100.

relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person" may be made the subject of counterclaim. The means of putting that section into operation are provided by Order XIX., r. 3, and Order XXI., rr. 11 and 15. Order XIX., r. 3, declares the right of the defendant or the mode of execution of the right of the defendant to set up a counterclaim. The defendant in an action may set up by way of counterclaim any right or claim, whether such counterclaim sound in damages or not, and such counterclaim shall have the same effect as a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. Rule 15 of Order XXI., to which I shall presently have to refer, is supplementary, and deals with the specific case where a defendant sets up a counterclaim in which the plaintiff and another person or persons are defendant or defendants by way of counterclaim. Rule 11 provides: "Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff along with any other persons, he shall add to the title of his defence a further title. . . . ." Rule 15 provides that either the plaintiff or any other person who is named as party to any action by such counterclaim may at any time before reply apply to the Court for an order that such counterclaim may be excluded. Then there is Order XIX., r. 3, which deals with the exercise of the right under circumstances where the plaintiff and the defendant are alone concerned.

It seems to me that the defendant in the present action is within the terms both of the Judicature Act, 1873, and of Order XIX., r. 3. He is raising a claim which relates to and is connected with the original subject of the cause or matter in this way. The plaintiff in the original action will not be entitled to succeed if the defendant establishes that upon the railway journey by reason of negligence or breach of contract by the plaintiff these goods suffered damage and their value was destroyed or materially reduced. The plaintiff would then suffer a reduction of his claim if not the total destruction of it. It is said that to the extent to which the defendant

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succeeds against the plaintiff he will defeat his own claim against the railway company. This is not the first time that that kind of contention has been raised to prevent the application of the section of the Judicature Act, 1873, which provides for the inclusion as far as possible in one action of matters which are in litigation between parties. In *Child* v. *Stenning* (1), to which reference was made in the course of the argument, Mellish L.J. said: "If we were to say that two persons could not be joined as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated. In most cases where alternative remedies are sought against two persons the causes of action are different; as in the case where an action is brought against an agent and his principal, because the plaintiff is uncertain whether he shall be able to prove the authority given to the agent, as in *Honduras Inter-Oceanic Ry. Co.* v. *Tucker*. (2) There the plaintiff seeks compensation for one wrongful act, but he cannot tell which of two parties is really liable." That seems to me together with the consideration of the main provision with regard to this matter in s. 24, sub-s. 3, of the Judicature Act, 1873, to entitle the present defendant as plaintiff to maintain his alternative cause of action against the original plaintiff and against the railway company.

It is said that in a case before the Divisional Court of *Times Cold Storage Co.* v. *Lowther & Blankley* (3) it was held that where there is a claim in the alternative the rule does not apply, and reliance was placed upon the following passage in the Annual Practice, 1919, p. 372, in the notes to Order XXI., r. 11: "But the rule does not apply where the defendant's claim against the third person is alternative to his claim against the plaintiff, not 'along with' it." I think the meaning of that rule and of that passage and of the decision in the case upon which reliance is placed have been misunderstood. The case of *Times Cold Storage Co.* v. *Lowther & Blankley* (3) was one of mutually exclusive claims which could not exist together,

(1) 5 Ch. D. 695, 702. (2) (1877) 2 Ex. D. 301.
(3) [1911] 2 K. B. 100.

which arose out of different sets of facts, either of which would give a right to a remedy, but the existence of either of which had not at the time been established. In the present case, as Mr. Jowitt pointed out, the defendant's main ground of complaint is that his goods were delivered to him in a condition in which they were of very little commercial value; that the damage apparently occurred during transit; that it may have been entirely due to bad packing and to the condition in which the goods were delivered; or that it may have been entirely due to exposure to the weather and standing in the rain; that it may, on the other hand, have been due to a combination of these causes; and that, if that were so, they would not be alternative claims, but they would be claims for injury and for negligence which had jointly contributed to the state in which the defendant's goods were delivered. I think that upon that ground the case is just outside of the authority of the case of *Times Cold Storage Co.* v. *Lowther & Blankley* (1), and well within the authority of the sub-section of the Judicature Act and the relevant rules, and that this appeal fails.

Appeal dismissed.

Solicitors for plaintiff in original action: *Oldman, Cornwall & Wood Roberts.*

Solicitor for railway company: *L. B. Page.*

Solicitor for defendant in original action: *Arnold Carter for Dunn & Baker, Exeter.*

(1) [1911] 2 K. B. 100.

W. I. C.

1919
April 3.

REX *v.* THE COMPENSATION AUTHORITY FOR THE COUNTY OF WEST SUFFOLK, *Ex parte* HUDSON'S CAMBRIDGE AND PAMPISFORD BREWERIES, LIMITED.

SAME *v.* SAME, *Ex parte* SAME.

Licensing Acts—Retailer's On-licence—Discontinuance of Business—"Prohibition or Restriction" under Emergency Legislation—Restriction of a General Character—Certificate of Commissioners of Customs and Excise—Repayment of Licence Duty—Suspension of Licence—Application for Renewal—Order of Justices referring Question of Renewal to Compensation Authority—Order of Compensation Authority refusing Renewal—Jurisdiction of Justices and Compensation Authority—Invalidity of Orders—Certiorari—Party aggrieved—Conduct disentitling to Writ—Discretion—Licensing (Consolidation) Act, 1910 (10 *Edw.* 7 *&* 1 *Geo.* 5, *c.* 24), *s.* 19—*Finance Act,* 1917 (7 *&* 8 *Geo.* 5, *c.* 31), *s.* 7, *s.* 8, *sub-ss.* 1, 2.

Sect. 8 of the Finance Act, 1917, which provides that where the holder of any wholesale dealer's or retailer's licence therein referred to satisfies the Commissioners of Customs and Excise that by reason of any "prohibition or restriction imposed by or under the authority of any enactment or regulation in connection with the present war" the licensed business has been discontinued, he shall be entitled to such repayment or remission of the licence duty as is therein mentioned, applies where the business has been discontinued not only by reason of a prohibition or restriction limited to the particular licensed premises or area in question, but also by reason of a prohibition or restriction extending to licensed premises in general, such as that occasioned by the public Acts and Orders restricting the output of intoxicating liquor during the war.

The distinction between s. 7 and s. 8 of the Finance Act, 1917, is that the former section applies where, notwithstanding the difficulties affecting the carrying on of the licensed business, that business has still been carried on, while the latter section applies where, by reason of these difficulties, the business has ceased to be carried on: *Per* A. T. Lawrence J.

Where under s. 8, sub-s. 1, of the Finance Act, 1917, the Commissioners of Customs and Excise have made a certificate granting to the holder of any wholesale dealer's or retailer's licence therein referred to, whose business has been discontinued by one of the causes there mentioned, repayment or remission of so much of the annual licence duty as is applicable to the period of the year during which the business is not carried on, and consequently, under sub-s. 2 of that section the excise licence and the justices' licence are deemed to be suspended as from the commencement of that period, the licensing justices during the period of suspension of the licence have no jurisdiction under s. 19,

sub-s. 1, of the Licensing (Consolidation) Act, 1910, to refer an application for renewal of the justices' licence to the compensation authority; and, in the event of their purporting to do so, the compensation authority have no jurisdiction under sub-s. 2 of the last-mentioned section to make an order refusing the renewal of the licence subject to the payment of compensation.

Rex v. *Chester Licensing Justices, Ex parte Bennion* [1914] 3 K. B. 349 distinguished.

On an application by the owners of licensed premises for a writ of certiorari to quash an order of the compensation authority refusing the renewal of the licence on the ground that that order had been made without jurisdiction:—

Held, on the facts, that there had been no conduct on the part of the applicants disentitling them as persons aggrieved to the issue of the writ ex debito justitiæ.

Rex v. *Williams, Ex parte Phillips* [1914] 1 K. B. 608 distinguished.

Two orders nisi, the first for a certiorari and the second for a prohibition.

By an agreement dated September 20, 1913, Hudson's Cambridge and Pampisford Breweries, Ld., hereinafter called "the owners," who were the proprietors of premises known as the "Coach and Horses" at Honey Hill, Bury St. Edmunds, agreed to let the premises to Charles Mitchell, hereinafter called "the tenant," until the agreement should be terminated as therein provided at the yearly rent of 12*l*. for use as a public-house.

The tenant was the holder of a justices' licence dated February 7, 1917, which was to be in force from April 5, 1917, until April 5, 1918. He was also the holder of an excise licence dated October 1, 1917, which was to be in force from its date until October 1, 1918. The business of the house had gradually declined until in 1917 it became impossible for the tenant to carry it on at a reasonable profit, and on March 30, 1917, he accordingly discontinued the business and closed the premises.

On February 7, 1918, the general annual licensing meeting of the justices was held. The tenant, supported by the owners, made an application for a renewal of the justices' licence. A report of the superintendent of police was, however, put in which went to show that a licensed house at the place where the house was situate was unnecessary. The justices were of opinion that the house was not required, and they

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caused a formal notice of objection to the renewal signed by their clerk to be served upon the tenant and the owners, which set out as the grounds of objection that a licensed house was not required at that place, that having regard to the character and necessities of the neighbourhood the licence was unnecessary, and that in the general interests of the public the renewal was not desirable. The justices however did not then decide the case, but adjourned it to March 7, 1918. No objection to the renewal was then or at any time made on the ground of misconduct.

On February 20, 1918, the tenant at the suggestion of the owners reopened the house for business from 8 A.M. to 10 P.M. on week days and from 12.30 to 2.30 P.M. on Sundays, but closed it again on February 28, 1918, having sold only nine gallons of beer during that period.

On February 28, 1918, the tenant desiring to take advantage of the provisions in that behalf of the Finance Act, 1917 (1),

Finance Act, 1917, s. 7: "(1.) In order to give relief in respect of the restriction of business caused by the Intoxicating Liquor (Output and Delivery) Order, 1917, the holder of an excise liquor licence, being one of the licences specified in the Second Schedule to this Act, shall be entitled to obtain, on the expiration of the licence, repayment in respect of the duty paid by him for the licence at the rate of one-sixteenth part of the duty for a full year for every month or part of a month during which the said order has been in force and the licence has been current, but repayment shall not in any case exceed three-fourths of the duty paid for the licence.

"(2.) The provisions of this section shall have effect as from and after the thirty-first day of March nineteen hundred and seventeen, and as regards any excise liquor licence to which this section applies, but, subject always to the right of the holder of any such licence to a proportionate repayment or rebate in respect of the period ending on the said thirty-first day of March, the provisions of section nine of the Finance Act, 1914 (Session 2), section six of the Finance Act, 1915, and section seventeen of the Finance (No. 2) Act, 1915, shall cease to have effect."

Sect. 8: "(1.) Where the holder of any wholesale dealer's or retailer's licence taken out under Part II. of the Finance (1909–10) Act, 1910, satisfies the Commissioners of Customs and Excise that by reason of the licensed premises having been destroyed or seriously damaged, or by reason of any prohibition or restriction imposed by or under the authority of any enactment or regulation in connection with the present war, the business for the purpose of which or in connection with which the licence was granted has been discontinued, he shall, on making application to the Com-

wrote to the Commissioners of Customs and Excise a letter of that date which was as follows: 'In consequence of the prohibition and restrictions that have been imposed in connection with the war, the business at the 'Coach and Horses,' Bury St. Edmunds, for which an excise licence was granted to me, has been discontinued on and since the 28th day of February, 1918, and I therefore apply under s. 8 of the Finance

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missioners within one month after the discontinuance or within such longer period as the Commissioners may in any special case allow, be entitled to obtain repayment, or, so far as the duty has not been paid, remission, of such part of the duty for the year as bears to the full amount of that duty the same proportion as the period during which the business is not carried on, or the part thereof falling within the year, bears to a whole year.

"(2.) In any such case as aforesaid . . . . the excise licence, and any justices' licence on the authority of which the excise licence was granted, shall be deemed to be suspended as from the commencement of the period aforesaid; but at the expiration of that period any such justices' licence shall revive, and have effect as if it had been granted for the then current licensing year, and, if the revival takes place between the date of the general annual licensing meeting in any licensing year and the end of the year, as if it had been granted for that year and the next licensing year, or, in the case of a licence granted for a term, as if the term were extended by a period equal to the period of suspension, and the holder of an excise licence which has been so treated as suspended shall be entitled to take out an excise licence on payment of such an amount in respect of excise duty as would have been payable by him had he been a new beginner at the expiration of that period:

"Provided that if during the period for which any licence is so treated as suspended a contingency occurs upon which a transfer of the licence might have been granted but for the suspension, a transfer may be granted either—

"(*a*) at the time at which, and to a person to whom, a transfer might have been granted had the licence not been suspended; or

"(*b*) after the expiration of the period to any person to whom a transfer might have been granted had the contingency occurred immediately after the expiration of the period;

"Provided also that if during the period for which any licence is so treated as suspended a person desires to make an objection on the ground of misconduct to the revival of the licence he may make such an objection in the same manner as he may make an objection to the renewal of a justices' licence, and if on any such objection being made the justices certify that had the licence not been suspended they would have refused the renewal thereof the licence shall not revive.

"(3.) The licence-holder before making an application under subsection (1.) of this section shall give notice of his intention to the registered owner of the premises. . . . ."

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Act, 1917, for repayment or remission of so much of the duty as is represented by the unexpired portion of the licence year. Notice of this application has been given to Hudson s Cambridge and Pampisford Breweries, Ld., the registered owners of the said premises." On March 6, 1918, the Secretary of the Commissioners of Customs and Excise on their behalf wrote to the tenant in reply the following letter: "The Board of Customs and Excise have had before them your application of the 28th ult. for relief under s. 8, sub-s. 1, of the Finance Act, 1917, in respect of the following licence, namely: Beer retailer on, for year ending September 30, 1918, granted in connection with the business at the 'Coach and Horses,' Bury St. Edmunds, which has been discontinued as from the 1st inst. inclusive, and they direct me to inform you that under the provisions of the sub-section referred to they have authorised the remission of duty in respect of the licence in question as from the 1st inst. inclusive. The necessary directions in regard to such remission have been given to their collector at Ipswich."

On March 7, 1918, the adjourned general annual licensing meeting sitting as the renewal authority took into consideration the question of the renewal of the justices' licence of the house. The owners and the tenant appeared and were represented by a solicitor who stated that, as an application had been made by the tenant to the Commissioners under the Act of 1917 and granted, the tenant's application for a renewal was withdrawn, and there was no application for a renewal before the justices, that the justices had no jurisdiction either to refuse, renew or refer the licence, and that he only appeared out of courtesy to the justices in order to explain the circumstances to them. The justices then took formal evidence from the police, which went to show that the licence was not necessary. The tenant was asked to give evidence, but on advice he declined to do so. The justices thereupon, under s. 19 of the Licensing (Consolidation) Act, 1910, referred the question of the renewal of the licence together with their report thereon to the compensation authority for West Suffolk; but under rule 41 of the Licensing Rules, 1910,

they granted the renewal of the licence, inserting in the licence a statement that the renewal was provisional.

On October 30, 1918, a notice signed by the clerk to the compensation authority was served on the tenant informing him that the principal meeting of that authority would be held on November 11, 1918. On November 2, 1918, the solicitors for the owners and for the tenant wrote to the clerk of the compensation authority stating the facts above mentioned and contending that the authority had no jurisdiction to deal with the case. The clerk replied that he would submit the letter to the authority. On November 11, 1918, the principal meeting of the compensation authority was held. Neither the tenant nor anyone representing either him or the owners attended. The above-mentioned letter from the solicitors of the owners and tenant to the clerk of the authority was read to the authority, when the clerk submitted that the authority had jurisdiction to deal with the case. The authority decided to proceed with the case, and after hearing on oath the evidence set out in the report of the justices they refused the renewal of the licence subject to the payment of compensation. On December 21, 1918, the clerk to the compensation authority sent to the owners and the tenant, who received it on the following day, a notice in these terms: "Notice is hereby given that the compensation authority . . . . at their principal meeting held on November 11, 1918, decided in pursuance of their power under the above Act [the Licensing (Consolidation) Act, 1910] to refuse the renewal of the licence of the premises. . . . . Compensation becomes therefore payable, and your attention is called to rules 21 to 36 of the Licensing Rules, 1910."

On February 14, 1919, on an application to the King's Bench Division by the owners, supported by an affidavit of the managing director of their company stating the facts above mentioned, alleging that the business of the house had been discontinued by reason of the restriction of business caused by the Output of Beer (Restriction) Act, 1916 (6 & 7 Geo. 5, c. 26), and the Intoxicating Liquor (Output and Delivery) Orders, 1917 and 1918, and exhibiting the documents

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above referred to, the applicants obtained an order nisi for a certiorari calling upon the compensation authority under s. 2, sub-s. 2, of the Licensing (Consolidation) Act, 1910, to show cause why a writ of certiorari should not issue to remove into the King's Bench Division the order made by them on November 11, 1918, whereby the licence of the premises in question was refused, upon the ground that the authority had no jurisdiction to deal with or refuse the renewal of the justices' licence subject to the payment of compensation or at all, inasmuch as that licence was at all material times deemed suspended by virtue of s. 8, sub-ss. 1 and 2, of the Finance Act, 1917, and an authority of the Commissioners of Customs and Excise given thereunder.

On the same date on an application supported by the same evidence the owners obtained an order nisi for a prohibition calling upon the compensation authority to show cause why a writ of prohibition should not issue to prohibit them from further proceeding to deal with the matter of compensation payable in consequence of the order made by them on November 11, 1918, whereby the renewal of the licence of the premises was refused.

Disturnal K.C. and *G. C. Whiteley* for the compensation authority showed cause.

These orders nisi should both be discharged.

The order of the compensation authority is a valid order, and the applicants, the owners of the licensed premises, are not entitled to a writ of certiorari to quash that order on the grounds which they allege, namely, that there was a valid certificate of the Commissioners of Customs and Excise under s. 8 of the Finance Act, 1917, that that certificate suspended the licence, that therefore the justices had no jurisdiction to refer the question of renewal of the licence to the compensation authority, that that authority had therefore no jurisdiction to make the order refusing renewal subject to compensation, and that the applicants are entitled as persons aggrieved to relief by certiorari.

First, the certificate of the Commissioners of Customs and

Excise authorizing a remission of duty in respect of the licence was invalid. In the circumstances of the present case an order of that kind could only have been made under s. 7 of the Act of 1917, and ought not to have been made under s. 8. The object of s. 7 is expressed to be to give relief in respect of the restriction of business caused by "the Intoxicating Liquor (Output and Delivery) Order, 1917," and it was intended to apply in case of restrictions of business caused by public Acts or Orders affecting licensed premises in general. On the other hand, s. 8 applies in terms in case of certain causes affecting "the licensed premises," that is the particular licensed premises that may be in question, and the words "any prohibition or restriction imposed by or under the authority of any enactment or regulation in connection with the present war" were introduced into the section more especially for the purpose of making it apply in cases where particular premises were closed or their business restricted by the Central Control Board in pursuance of the Defence of the Realm (Liquor Control) Regulations, 1915, or by naval or military authorities acting under powers conferred upon them by the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), and the Regulations thereunder. The wording of the sidenotes to these two sections tends to confirm the view that the former applies to general and the latter to particular restrictions. It appears from the affidavit on which the applicants obtained the orders nisi that the business of the licensed premises now in question was discontinued by reason of the Output of Beer (Restriction) Act, 1916, and the Intoxicating Liquor (Output and Delivery) Orders, 1917 and 1918, all of which impose restrictions upon public-houses in general. That being so, a certificate of the Commissions under the Finance Act, 1917, could be made in respect of the premises under s. 7 of that Act only, and not under s. 8. The certificate of the Commissioners was therefore invalid, and did not interfere with the jurisdiction of the justices or the compensation authority to make the orders which they respectively made.

Even if the certificate of the Commissioners was valid under s. 8, sub-s. 1, the justices' licence was not suspended under

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sub-s. 2 of that section. The latter sub-section no doubt states that the licence shall be deemed to be suspended, but it does not suspend the licence absolutely, because it goes on to provide that during the suspension a transfer of the licence may be granted, and an objection to the revival of the licence on the ground of misconduct may be taken.

Assuming that the certificate of the Commissioners was valid, and that it had the effect of suspending the licence, it does not follow that the reference by the justices of the question of renewal to the compensation authority must be treated as invalid. It does not appear that that reference was made without jurisdiction because it was made during the suspension of the licence. If that reference was irregular because it was made during that period, no steps were taken to set it aside by certiorari during the six calendar months prescribed for that purpose by rule 21 of the Crown Office Rules, 1906, and on the expiration of that time it could no longer be impugned and must then have been treated as regular.

At all events the order of the compensation authority refusing the renewal of the licence cannot be treated as invalid or irregular. At the time when that order was made the six months already referred to had expired, and there was therefore a reference by the justices pursuant to s. 19, sub-s. 1, of the Licensing (Consolidation) Act, 1910, which could not be impugned, referring the question of the renewal to the compensation authority. That being so, that authority was bound under sub-s. 2 of that section to deal with the matter and to make an order in regard to it, and the order which they made is valid and ought not to be set aside: *Rex* v. *Chester Licensing Justices, Ex parte Bennion* (1); *Rex* v. *Somerset Justices, Ex parte Joyce.* (2)

In any case the applicants are not entitled to a writ of certiorari to quash the order of the compensation authority which refused the renewal of the licence on the ground that the licensed house was in fact no longer required. The conduct

(1) [1914] 3 K. B. 349.

(2) [1906] See Paterson's Licensing Acts (24th ed.), p. 455.

of the appellants has been such as to disentitle them to the writ. Under s. 8, sub-s. 1, of the Act of 1917, the licence holder must make application to the Commissioners for repayment of the licence duty within one month after the discontinuance of the business, or within such longer period as the Commissioners may allow. In the present case the licensed house had been closed since March 30, 1917, and the applicants incited the tenant to reopen the house from February 20 to February 28, 1918, not with the bona fide intention of his resuming the business or of supporting his application for a renewal of the licence, but with the indirect object of improving his chance of obtaining from the Commissioners of Customs and Excise a certificate for repayment of the licence duty which might suspend the licence and so deprive the justices and the compensation authority of jurisdiction to refuse the renewal of the licence. Moreover,thea pplicants neglected to apply for a certiorari to set aside the reference by the justices upon which the order of the compensation authority was founded until it was too late to do so. By reason of that misconduct the applicants cannot be treated as persons aggrieved by the order of the compensation authority and are not entitled to a writ of certiorari to set it aside ex debito justitiæ, but only at the discretion of the Court: (*Rex* v. *Williams*) *Ex parte Phillips* (1)), and in the circumstances the Court ought to exercise its discretion by refusing the writ.

Wootten for the applicants was not called upon to argue.

BRAY J. In this case the applicants, who are the owners of a fully licensed public-house in Bury St. Edmunds, have caused to be issued against the compensation authority for the county of West Suffolk two orders nisi, the one for a writ of certiorari to remove into this court an order made by the compensation authority, and the other for a writ of prohibition to prevent that authority from further proceeding to act upon their order.

I will deal first with the order nisi for a certiorari. [His

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Lordship fully stated the facts and continued :] The applicants obtained the order nisi for a certiorari upon the alleged grounds that the certificate of the Commissioners of Customs and Excise was valid under s. 8, sub-s. 1, of the Finance Act, 1917, that that certificate suspended the existing justices' licence under sub-s. 2 of that section, that the justices had therefore no jurisdiction to refer the question of the renewal of that licence to the compensation authority, that the compensation authority had accordingly no jurisdiction to make the order in question refusing the renewal of the licence with compensation, and that the applicants are entitled to a writ of certiorari to bring up that order to be quashed.

The compensation authority now show cause against the order nisi.

The first point taken on behalf of that authority is that the Commissioners of Customs and Excise had no jurisdiction to make the certificate or order which they made on March 6, 1918. The application made by the tenant on February 28, 1918, to the Commissioners of Customs and Excise for repayment or remission of licence duty, purported to be made under s. 8 of the Finance Act, 1917, and the certificate or order made by the Commissioners on March 6, 1918, authorizing the remission of duty as from March 1, 1918, also purported to be made under that section. In order to find whether the Commissioners had jurisdiction to make the certificate or order under that section of the statute, we have, therefore, to consider that section, and also to consider the grounds upon which the application was made and granted. Sect. 8, sub-s. 1, provides that where the holder of the licence satisfies the Commissioners that by reason of any "prohibition or restriction imposed by or under the authority of any enactment or regulation in connection with the present war" the business has been discontinued, he shall be entitled to the repayment or remission of licence duty as therein mentioned. In his application to the Commissioners the tenant alleged that it was "in consequence of the prohibitions and restrictions that have been imposed in connection with the war" that the business had been discontinued. The case which he presented

was that by reason of the restrictions on the output of beer resulting from the Output of Beer (Restriction) Act, 1916, and the Intoxicating Liquor (Output and Delivery) Orders, 1917 and 1918, he could not get so much beer as he had previously got, and was unable to carry on the business at a reasonable profit. The restrictions alleged were thus restrictions of a general character affecting all public-houses throughout the country. It was contended on behalf of the compensation authority that that was not a prohibition which fell within s. 8, sub.-s. 1. The argument was that that sub-section applies not to a general restriction, but to a restriction relating to particular licensed premises. It seems to me that the section contains no words which would justify so narrow a construction, and that we ought not to put any such limitation upon it. There would seem to be no reason why a general restriction upon the output of beer, as well as a particular restriction, should not affect the takings of the licensed house and therefore fall within the ambit of the section. In my opinion it cannot be said that the general statutory restriction of which the applicants complain is not a "prohibition or restriction imposed by or under the authority of any enactment" within the meaning of s. 8, sub.-s. 1, and the contention of the compensation authority that the certificate of the Commissioners was made without jurisdiction therefore fails.

The next point taken on behalf of the compensation authority is that even if the certificate of the Commissioners was valid, it did not suspend the justices' licence under s. 8, sub-s. 2. That sub-section enacts that in any case coming under the section the licence "shall be deemed to be suspended as from the commencement of the period aforesaid," that is, the period during which the business is not carried on, and the sub-section has a proviso that during the period of suspension an objection may be made on the ground of misconduct to the revival of the licence in the same manner as to the renewal of a justices' licence. In this case it is not suggested that there was any misconduct which would justify an objection to the revival of the licence. It seems to me that the case

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falls not within the proviso to sub-s. 2, but within the enacting part of that sub-section, and that the licence must be deemed to have been suspended as from March 1, 1918, and therefore to have been suspended at the time when the order of the justices and the order of the compensation authority were made.

The next question that is raised is whether, notwithstanding the suspension of the licence under s. 8 of the Act of 1917, the justices had not jurisdiction to make an order either granting, or refusing, the renewal of the licence or a reference of the question of renewal to the compensation authority. It appears that at the adjourned general annual licensing meeting on March 7, 1918, the tenant withdrew his application for a renewal of the licence, so that there was then no application for a renewal before the justices. Whether the tenant withdrew that application or not, the fact, however, remained that under a statutory enactment the licence was at that time suspended and was to revive at a future date. It therefore seems to me that the justices at that meeting had no jurisdiction to make any order or any reference in regard to the matter, and that the reference which they made to the compensation authority of the question of the renewal together with their report thereon was invalid.

Another question raised by the compensation authority is whether the applicants, not having sought to get rid within the time limited of the reference by the justices to the compensation authority of the question of renewal together with the report thereon, can now get rid of the order of the compensation authority which was made in pursuance of that reference from the justices. The order of the compensation authority was made under s. 19, sub-s. 2, of the Licensing (Consolidation) Act, 1910, and reliance is placed upon the fact that that sub-section provides that that authority " shall " consider all reports made to them by the licensing justices. It seems to me, however, that the compensation authority, whose jurisdiction to deal with the question of the renewal of the licence is derived from the reference and report of the justices, can have no greater jurisdiction than the justices

had, and that if the justices had no jurisdiction to refer the matter to the compensation authority, that authority can have obtained by virtue of the reference no jurisdiction to make any order in regard to the renewal. The consequence, I think, is that any order of the compensation authority purporting to interfere with the direction in s. 8, sub-s. 2, of the Act of 1917, that at the end of the period of suspension the justices' licence shall revive, must necessarily be void.

The last point taken on behalf of the compensation authority is that in the circumstances the Court ought not to grant the applicants a writ of certiorari to bring up the order of the authority to be quashed. A person who is aggrieved by an order of that kind is entitled ex debito justitiæ to a writ of certiorari to set it aside, unless there has been some conduct on his part which disentitles him to the writ. It seems to me that the applicants were undoubtedly persons aggrieved by the order of the compensation authority, and that the only question therefore is whether they have done anything which disentitles them to the relief which they claim. In the case of *Rex* v. *Williams, Ex parte Phillips* (1), where a man applied for a writ of certiorari to quash an order made by justices on the ground that one of the justices was an interested party, it was held that the applicant was not entitled to the writ ex debito justitiæ because, knowing of the disqualification, he had chosen to stand by during the hearing before the justices without taking any objection. In the present case, however, there has been nothing, so far as I can see, in the conduct of the applicants that disentitles them to relief. It is obvious that they thought that, as the premises had been closed during the preceding twelve months, the trial of the question of redundancy would be disadvantageous and unfair to them, and that they therefore desired to avoid the trial of that question. Fortunately for them s. 8 of the Finance Act, 1917, contains provisions which enabled them to do so. They obtained an order of the Commissioners under that section by virtue of which the licence was suspended and would revive at the end of the period of suspension. It seems to me that

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that was not conduct on their part of such a kind as to disentitle them to the writ.

I am, therefore, of opinion that the order nisi for a certiorari to quash the order of the compensation authority ought to be made absolute.

That being so, it seems to me that there is no occasion to deal with the application for the writ of prohibition, because the compensation authority cannot proceed further upon an order which has been quashed.

A. T. LAWRENCE J. I am of the same opinion. I do not desire to express any decided view upon the question whether the rule for a prohibition should be made absolute. In the case of *Rex* v. *Chester Licensing Justices, Ex parte Bennion* (1), it was held that, where the justices have referred the question of renewal to the compensation authority together with their report thereon, and the report is good upon its face, the compensation authority are bound to act upon it and will not be prevented from doing so by a writ of prohibition. That case appears to be opposed to what I should have thought was the sounder view ; but I should require to give it much further consideration before I should be prepared to say whether or not it was wrongly decided. For the present I merely desire to state that I do not proceed upon the authority of that case.

The order nisi for a certiorari ought, I think, to be made absolute. The argument of counsel for the compensation authority that in this case the application for repayment or remission of licence duty ought to have been made under s. 7, and not under s. 8 of the Act of 1917, is not well founded. They desire, apparently, to construe s. 8 as if it only applied to a prohibition or restriction imposed upon a particular person or house. I fail to see any reason for giving to the section that limited construction. It seems to me that the true distinction between s. 7 and s. 8 is that the former section applies where, notwithstanding the difficulties of carrying on business, the business has still been carried on,

(1) [1914] 3 K. B. 349.

while the latter section applies where by reason of these difficulties the business has been discontinued. The business may be discontinued by reason of the premises having been destroyed or seriously damaged, or by reason of some prohibition or restriction by or under the authority of any enactment or regulation in connection with the present war. If for either of these reasons the business is discontinued then s. 8, sub-s. 1, gives the licence holder power to apply to the Commissioners of Customs and Excise, and under that statutory power the Commissioners can if satisfied thereof remit a portion of the excise duty for the period during which the house has been closed. Thereupon, under sub.-s. 2 the licence shall be deemed to be suspended as from the commencement of the period aforesaid, but on the expiration of that period the justices' licence "shall revive and have effect as if it had been granted for the then current licensing year." That is a clear statutory provision by virtue of which when the licence duty has been remitted for a period, the licence is suspended for that period, at the expiration of which it will revive. By virtue of that provision the licence here in question has been suspended but will afterwards revive. It seems to me that the compensation authority on having that fact brought to their knowledge had no right to disregard it and to treat the case as one of a licensed house whose tenant was applying for a renewal of a licence which the justices still had power to grant or to refuse. The power of the justices to deal with the question of renewal is suspended for the time being along with the licence itself. When the period of suspension terminates, the justices will again have power in a proper case upon future applications for renewal to deal with the matter according to law, but during the suspension of the licence they have no such power. As the licence was suspended under s. 8 of the Act of 1917, the justices in referring the question of renewal to the compensation authority, and the compensation authority in making an order refusing the renewal, acted improperly and without jurisdiction.

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In my opinion the writ of certiorari ought to go to quash the order of the compensation authority.

I agree that the order nisi for a prohibition should be discharged.

SHEARMAN J. I am of the same opinion.

I merely desire to add a few words, because I think it might at first sight be supposed that the decision which we are giving in the present case cast some doubt upon the correctness of the decision in *Rex* v. *Chester Licensing Justices, Ex parte Bennion* (1), to which we have been referred. I draw no distinction between that case and this on the ground that there the application was for a writ of prohibition, while here it is for a writ of certiorari, because I think that applications for these two writs ought to rest upon substantially the same basis.

I think, however, that there is a material distinction between the two cases as regards the grounds of the respective applications. In *Rex* v. *Chester Licensing Justices, Ex parte Bennion* (1), where the application was by the licensee for a writ of prohibition to prevent the justices and the compensation authority from proceeding with a reference by the justices to the authority in regard to the renewal of the licence, the ground of the application was that the necessary notice of objection to the licensee's claim for renewal had not been given, and it was there held that the writ would not lie. I have no doubt that the informality there relied upon was one of great importance, and that unless it could have been got rid of it was necessarily fatal to the regularity of the proceedings before the justices. It was, however, an informality which the parties might have waived had they thought fit to do so, and that being so I do not think it was an informality which went to the root of the jurisdiction of the justices. In *Rex* v. *Somerset Justices, Ex parte Joyce* (2), where the licensee applied for a prohibition against the compensation authority to prevent them from proceeding with a reference to them by the justices of the

(1) [1914] 3 K. B. 349. (2) See Paterson's Licensing Acts (24th ed.), p. 455.

question of renewal, the ground of the application was that the justices had heard no evidence, and in that case the rule nisi for the writ was discharged. These two cases decided that an informality of the kind there in question affecting the reference by the justices, which might be fatal if objected to in due time, would not invalidate the reference by the justices and the subsequent proceedings if the objection to it were not taken until the case had come before the compensation authority, and that at that stage it would be too late to apply for a writ of prohibition on the ground of the informality against the compensation authority who were merely doing their duty in carrying out the reference by the justices which, as matters then stood, could not be questioned by the parties.

In the present case the ground of the application for the writ of certiorari is very different and arises in exceptional circumstances. The Finance Act, 1917, which was passed under war conditions, provides by ss. 7 and 8 that where the business of the licence holder is restricted or discontinued he shall be entitled to apply to the Commissioners of Customs and Excise for an order for repayment or remission of a proportion of the licence duty, and that in cases such as the present where the order is granted, the licence shall be suspended for a time and shall afterwards revive. I do not wish to add anything to what has been said by the other members of the Court as to the interpretation of these provisions. The Commissioners are constituted by the Act of 1917 the final authority in regard to the licence with power to order its suspension for a time and its revival when the period of suspension ceases. I have no doubt that in the present case the certificate which the Commissioners made under s. 8 at the request of the tenant has had the effect of suspending the licence and thus of preserving it until the time comes for its revival. I therefore think that the order of the Commissioners overrode the jurisdiction of the justices to make any order either granting, refusing or referring the question of the renewal of the licence. The result is that the reference by the justices on March 7, 1918, of the question of the renewal to the compensation authority was not affected by a mere

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informality which could be cured, but was invalid, inasmuch as the jurisdiction of the justices to deal with the matter had then ceased in consequence of the decision of the Commissioners; and if the reference by the justices was invalid, so also was the order of the compensation authority which was founded upon it. I therefore think that there is an essential distinction between the present case and *Rex* v. *Chester Licensing Justices, Ex parte Bennion.* (1)

I may say that I think that a most inconvenient course has been adopted here. I should much have preferred that the applicants had questioned the decision of the licensing justices within the six months prescribed for that purpose instead of allowing that period to elapse and then questioning the order of the compensation authority. For some time during the argument I leaned towards the suggestion that after the six months had elapsed it was too late to question the decision of the compensation authority. The cases to which we have been referred suffice, however, to show that a person aggrieved by an order of that kind is entitled as of right to a writ of certiorari to quash the order in the absence of any conduct on his part disentitling him to the writ. I do not think it can be said that the applicants by their delay have been guilty of conduct disentitling them to the relief which they claim.

I think that the order nisi for a writ of certiorari ought to be made absolute on the ground that the order of the compensation authority which it is sought to set aside was invalid by reason of the fact that the Commissioners had previously made a certificate which prevented the compensation authority from dealing with the licence.

Order nisi for certiorari made absolute.

Order nisi for prohibition discharged.

Solicitors for Compensation Authority: *Whites & Co., for Greene & Greene, Bury St. Edmunds.*

Solicitors for applicants: *Godden, Holme & Ward.*

(1) [1914] 3 K. B. 349.

J. R.

POLE-CAREW AND ANOTHER, APPELLANTS v. CRADDOCK (SURVEYOR OF TAXES), RESPONDENT. 1919 *April* 10.

Revenue—Income Tax—Ferry—Exemption—Future Imperial Tax—Recovery of Amount overpaid with Interest—30 *Geo.* 3. *c.* 61, *ss.* 15, 20—*Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Sched. A. No.* 3, *Third Rule*—*Revenue Act*, 1866 (29 *&* 30 *Vict. c.* 36), *s.* 8—*Taxes Management Act*, 1880 (43 *&* 44 *Vict. c.* 19), *s.* 59 *sub. s.* 4.

A ferry was established by and maintained under an Act of 1790 (30 Geo. 3, c. 61), which was to be deemed to be a public Act, and contained a provision that the then proprietors, or their respective heirs or assigns, "shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry . . . .":—

Held (applying to Imperial taxes the principle established by *Associated Newspapers* v. *City of London Corporation* [1916] A. C. 429, with regard to local taxes), that the exemption granted by the statute extended to Parliamentary taxes whether in existence at the date of the Act or not, and therefore included the income tax, although that tax was first imposed subsequently to the passing of the Act of 1790.

CASE stated under the provisions of s. 59 of the Taxes Management Act, 1880, by the commissioners for the general purposes of the Income Tax Acts for the East South Division of Cornwall.

At a meeting of the Commissioners held on December 6, 1917, the appellants, Sir Reginald Pole-Carew and the Right Honourable John Townshend Lord St. Levan, proprietors of the Torpoint Ferry, appealed against an assessment of 4000*l.* made upon them under No. 3 of Sched. A, r. 3, s. 60, of the Income Tax Act, 1842, and s. 8 of the Revenue Act, 1866, for the year ending April 5, 1917, and an assessment for 4000*l.* for the year ending April 5, 1918, in respect of the profits of the ferry.

The Torpoint Ferry belongs as regards three-fourths share to Lieut.-General Sir Reginald Pole-Carew, and the remaining one-fourth to Lord St. Levan, and is conducted in the manner set forth below. The profits of the ferry, which are substantial, are divided in the above proportions between the proprietors. The ferry has never been assessed to any local rate or to land

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tax. So far as can be traced the profits of the ferry have always been assessed to income tax since it was imposed, and liability to the same has never previously been disputed in principle.

It is not disputed that if the profits of the ferry are liable to assessment to income tax the duty payable down to April 5, 1916, has been correctly computed and levied. The duty for 1916–7 and 1917–8 has been estimated, and it was agreed between the parties that any necessary adjustment of the figures thereof should stand over pending settlement of the general question as to the existence of any liability at all.

Ferries under the general provisions of the Income Tax Acts are assessable under the third rule of No. 3 of Sched. A, s. 60, of the Income Tax Act, 1842, and s. 8 of the Revenue Act, 1866. The Torpoint Ferry was established by and is maintained under an Act 30 Geo. 3, c. 61. The title of the Act describes it as an Act for authorizing and enabling "the Right Honourable George Earl of Mount Edgcumbe, and Reginald Pole-Carew, Esquire, to establish and maintain a common ferry over and across the river Tamer." The preamble states that "Whereby a constant intercourse is occasioned between the inhabitants of the said parishes: And whereas the establishing and maintaining of a common ferry . . . . will not only be of great and permanent utility and convenience to the inhabitants of both parishes" (i.e., Plymouth Dock and Antony St. Jacob) "as well as to those of other parts of the said several counties, but will be of public benefit." "And whereas the Right Honourable George Earl of Mount Edgcumbe and Reginald Pole-Carew, Esquire, are ready and willing" to incur the necessary expenditure "on being authorized and allowed by Parliament to demand and receive reasonable rates for passage and conveyance . . . . be it enacted . . . . that the said George Earl of Mount Edgcumbe and Reginald Pole-Carew, and their respective heirs and assigns shall be, and are hereby authorized, enabled, and impowered, to establish, keep, and maintain a common ferry, ... from a piece . . . . of vacant ground in the said parish of Stoke Damarel . . . . over and across the said River

Tamer to a piece . . . . of ground . . . . at Torpoint aforesaid. . . . ." Sect. 2 of the Act grants powers to dredge and do any constructional work necessary for the ferry . . . . and from time to time and at all times hereafter to do all other matters and things necessary and convenient " for establishing, maintaining, improving, perfecting, regulating, and managing the said ferry, and making the same as useful and advantageous as may be." Sect. 14 vests the sole right and property in the ferry and land, houses, etc., in Lord Mount Edgcumbe and Reginald Pole-Carew as tenants in common their respective heirs and assigns for ever. Sect. 15 (to which the side note is " Ferry not to be rated ") enacts, " And for asmuch as the establishment and maintenance of the said intended ferry will be for the convenience and advantage of the public, and the said George Earl of Mount Edgcumbe and Reginald Pole-Carew, and their respective heirs or assigns, will be put to a considerable charge and expense in and about the same, be it therefore enacted, that the said George Earl of Mount Edgcumbe and Reginald Pole-Carew, or their respective heirs or assigns, shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry, or the tolls, rates, or duties payable in respect thereof, and the boats, vessels, or landing-places thereto belonging."

Sect. 20 enacts that this Act shall " be deemed, adjudged, and taken to be a public Act; and shall be judicially taken notice of as such, by all judges, justices, and other persons whatsoever, without being specially pleaded." The Act has not since been modified either by Act of Parliament or otherwise.

In pursuance of the Act the Earl of Mount Edgcumbe and Mr. Reginald Pole-Carew duly established the ferry, and the ferry has since been continuously carried on by them and their successors in title, and is now being carried on by the present proprietors under and in accordance with the provisions of the Act. Immediately after the passing of the Act certain land on the Devonport side was converted

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into a canal and landing places on both sides of the river were constructed. Two boats were provided for passengers and two boats for animals and vehicles rowed by men across the ferry.

Some time after 1790 an interest in one-fourth of the ferry was conveyed to Sir John St. Aubyn. In 1802 the Earl of Mount Edgcumbe sold all his interest in the ferry to the said Reginald Pole-Carew, then the Right Honourable Reginald Pole-Carew. In 1827 further land was granted by the officers of the Board of Ordnance to Reginald Pole-Carew and Sir John St. Aubyn to enable the ferry to be worked by steam and to improve the landing stage, and in or about 1834, at an additional expense of several thousand pounds, an improved mode of crossing was established by means of a boat or bridge propelled by steam on two chains laid across the river. In or about 1890, at very considerable expense, the ferry canal was filled up and a new landing place was constructed upon the site of the canal, the War Office having given the proprietors notice to quit the landing stage previously used.

The ferry is now worked by means of steamboats running on chains with the addition of two steam launches plying within the limits of the ferry. The boats which run on chains run every half hour from 5.30 A.M. to 9.30 P.M., the steam launches run every quarter of an hour from 7.45 A.M. to 11.30 P.M.

Both at the time of the passing of the Act 30 Geo. 3, c. 61, and at the present time the ferry formed part of the main highway from Plymouth and the south and west of England into Cornwall. In 1790 the main road from London to Truro and Penzance was via Plymouth, and the London mails on coaches crossed at Torpoint. The coaches used this road until they ceased to run on the Cornish railway being opened. The road was in the hands of a turnpike trust. On the revival of through road traffic consequent on the invention of motor cars the ferry again resumed the position that it occupied at the end of the eighteenth and early nineteenth centuries, and in 1913 more than 6000 cars were conveyed across it. From

the time of the passing of the Act until the present day there have been large military and naval establishments of His Majesty in the neighbourhood of the ferry, whose requirements have necessitated the constant passage of the river within the limits of the ferry by officers of His Majesty's Ordnance and Army and Navy, and by vessels with goods for His Majesty's military and naval forces and otherwise for His Majesty's service.

On behalf of the appellants it was contended

(i.) That the ferry or the ferry tolls are not liable to be assessed to income tax by reason of the provision of the Act 30 Geo. 3, c. 61.

(ii.) That the special exemption conferred by the Act was not repealed or lessened by the provisions of the general Income Tax Act, 1842, or any subsequent Income Tax or Finance Act or otherwise. Reference was made to the terms of s. 187 of the Income Tax Act, 1842.

(iii.) That the exemption conferred by the Act 30 Geo. 3, c. 61, in terms excludes liability to assessment to parliamentary taxes in respect of the ferry of which income tax is one; and that on the true construction of the Act and in the circumstances of the case the exemption included income tax. Reference was made to *Stewart* v. *Thames Conservators*. (1)

(iv.) That the fact that the income tax was imposed subsequently to 30 Geo. 3, c. 61, was in itself immaterial. Reference was made to *Associated Newspapers* v. *City of London Corporation*. (2)

(v.) That 30 Geo. 3,c. 61, laid upon the proprietors a public duty enforceable by indictment and conferred on them a relief from other public burdens in return for their execution of the duty.

(vi.) That no previous practice with regard to income tax on the ferry can affect the interpretation of the statute or the rights of the appellants, and that until the decision of the House of Lords last referred to the law had been imperfectly declared.

The surveyor of taxes contended (inter alia)

(1) [1908] 1 K. B. 893. (2) [1916] 2 A. C. 429.

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(i.) That the ferry is assessable under No. 3 of Sched. A, r. 3, s. 60, of the Income Tax Act, 1842.

(ii.) That 30 Geo. 3, c. 61, being a local and personal Act, could not confer exemption from income tax.

(iii.) That the Act, having been passed before the Income Tax Act, could not affect the subsequent Revenue Act, which levied in express terms a new impost on the profits arising from all ferries in this country.

(iv.) That there is nothing in the wording of the exemption clause in the Act to imply that any but local rates and assessments were in question; while the context and purport of the Act lend no support to a wider interpretation, and the clause does not include income tax, which is an Imperial tax.

(v.) That the absence of any land tax assessments on the ferry does not affect the general revenue, and is therefore of purely local importance.

(vi.) That it would not be a reasonable interpretation of the exemption clause to allow that the whole of the kingdom should be called upon to bear the proprietors' income tax.

The commissioners having considered the facts were of opinion that the appellants were not entitled to the exemption claimed and dismissed the appeal, and confirmed the assessments subject to adjustment of figures as agreed.

Sir John Simon K.C. and *A. M. Latter* for the appellants. The commissioners for the general purposes of the income tax were wrong. The preamble to 30 Geo. 3, c. 61 (which is a public statute), by which the ferry was established, imposes a public duty upon the proprietors of the ferry, and by s. 15 accords them a corresponding relief in respect of public burdens. They are not to be assessed to the payment of any tax, even though a parliamentary tax. By s. 20 the Act is to be deemed a public Act. The fact that the income tax was imposed in 1799, after the passing of the Act 30 Geo. 3, c. 61, which took place in 1790, is immaterial. The decisions, including *Sion College* v. *London Corporation* (1), in which it was held that clauses containing exemptions from taxes

(1) [1901] 1 K. B. 617.

or rates exempt only from such taxes or rates as exist at the time when the exemption is granted, have been reviewed in *Associated Newspapers* v. *City of London Corporation* (1), where it was held that that was not the true view. It was there decided that although the exemption is contained in a statute earlier in date than that imposing a tax, the exemption nevertheless applies to the tax, and the decision to the contrary in *Sion College* v. *London Corporation* (2) was overruled.

Sect. 187 of the Income Tax Act, 1842, which is a re-enactment of s. 229 of 43 Geo. 3, c. 122, is in the appellants' favour, for it expressly provides that no statute granting any salary, annuity or pension free of taxes is to be construed as exempting from the duties imposed by the Act, but it leaves untouched any exemption to the income which the appellants enjoy, which arises from a right of ferry granted by statute. It also leaves untouched exemptions granted by statute from subsidies, tolls, taxes, assessments or aids as distinguished from similar exemptions granted by letters patent.

Stewart v. *Thames Conservators* (3) shows that the exemption from "parliamentary" taxes contained in s. 15 of 30 Geo. 3, c. 61, applies to income tax, and *Associated Newspapers* v. *City of London Corporation* (1) shows that there is no principle of construction which prevents the subject from relying for relief from a future tax on the words of an earlier statute. The fact that for many years the appellants by mistake or ignorance as to their rights have paid the tax cannot affect the construction of 30 Geo. 3, c. 61. [Sect. 8 of the Revenue Act, 1866 (29 & 30 Vict. c. 36) was also referred to.]

Sir Ernest Pollock S.-G. and *T. H. Parr* for the Crown. The appellants are assessable to income tax in respect of the profits of the ferry under s. 60, Sched. A, No. 3, r. 3, of the Income Tax Act, 1842, as modified by s. 8 of the Revenue Act, 1866. The fact that they are performing a public service does not free them from the public burden of income tax. The side note to s. 15 of 30 Geo. 3, c. 61, the purport of which is that the

(1) [1916] 2 A. C. 429. (2) [1901] 1 K. B. 617.
(3) [1908] 1 K. B. 893.

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ferry is not to be rated, may be looked at for the purpose of considering what the ambit of the section is. In *Stewart* v. *Thames Conservators* (1) Bray J. said: "It has been laid down quite clearly that, where an Act of Parliament contains an exemption from all Parliamentary rates and taxes, that means, in the absence of any special words, rates and taxes existing at the time when the Act in question was passed, and the exemption does not extend to any rates or taxes subsequently imposed." That is an accurate statement of the law. As 30 Geo. 3, c. 61, was passed in 1790, income tax which was not imposed till 1799 is not within the exemption granted by the Act of 1790. The law, as stated by Bray J., was not overruled by *Associated Newspapers* v. *City of London Corporation* (2), where the question of Imperial taxes did not arise upon the words then under consideration, and was specifically and in terms, particularly by Viscount Haldane, excluded from the judgments. The tax or imposition there considered was of a local nature. The law, as stated by Bray J., therefore still exists, and has never been overruled.

Sect. 187 of the Income Tax Act, 1842, has no application to the present case, as s. 15 of the Act of 1770 conferred no immunity to which s. 187 of the Act of 1842 could refer. The conclusion arrived at by the commissioners was therefore right. [*Bedford Guardians* v. *Bedford Commissioners* (3) and *Palmer* v. *Earith* (4) were also referred to.]

Sir John Simon K.C. in reply. In *Associated Newspapers* v. *City of London Corporation* (2) the House of Lords removed a misapprehension as to what the true principle is, but they did not for that purpose draw any distinction between Imperial and local taxes. The Act of 1767 with which they were dealing did not concern Imperial taxes. The question of principle whether the exemption extends to the future as well as the past involves a canon of construction and has nothing to do with the kind of tax which is being dealt with. The earlier authorities considered in the *Associated Newspapers Case* (2) were *Williams* v. *Pritchard* (5); *Eddington* v. *Borman* (6);

(1) [1908] 1 K. B. 893, 903, 904.
(2) [1916] 2 A. C. 429.
(3) (1852) 7 Ex. 777.
(4) (1845) 14 M. & W. 428.
(5) (1790) 4 T. R. 2.
(6) (1790) 4 T. R. 4.

Perchard v. *Heywood* (1); and *Rex* v. *London Gas Light and Coke Co.* (2), which contains the dictum of Bayley J. that "the exemption may be considered analogous to a covenant to pay taxes which applies to old taxes or others substituted for them, but not to taxes entirely new, unless there are express words to give it such extensive operation," and Holroyd J. concurred. In the *Associated Newspapers Case* (3) the previous decisions were explained, and none of them were overruled, except the *Sion College Case.* (4) It was merely laid down that the profession had not understood what the earlier decisions, other than the *Sion College Case* (4), mean, and it was also pointed out that the dictum of Bayley J. in *Rex* v. *London Gas Light and Coke Co.* (2), was not a decision. The dictum was in 1828, after the Income Tax Acts of 1799 and 1803 had been passed. In the *Associated Newspapers Case* (3) the House of Lords held that that to which Bray J. referred in *Stewart* v. *Thames Conservators* (5) as having been laid down quite clearly had not been laid down at all. Bray J.'s statement was founded on *Sion College* v. *London Corporation* (4), which to that extent was overruled by the *Associated Newspapers Case.* (3) [*Seward* v. *Owners of Vera Cruz* (6) and *Mersey Docks and Harbour Board* v. *Lucas* (7) were also referred to.]

ROWLATT J. The question in this case is whether the owners of a ferry are exempt from income tax in respect of it by virtue of s. 15 of the Act 30 Geo. 3, c. 61, passed in 1790, which authorized the establishment of the ferry. The relevant words of exemption are few, and are: The promotors (naming them) "shall not be rated or assessed for or toward the payment of any tax, rate, or assessment whatsoever, parliamentary or parochial, for or in respect of the said ferry." There can be no question that income tax was unknown at the time of the passing of that Act, and in construing this section, it must be regarded as a future tax.

(1) (1800) 8 T. R. 468.
(2) (1828) 8 B. & C. 54, 62.
(3) [1916] 2 A. C. 429.
(4) [1901] 1 K. B. 617.
(5) [1908] 1 K. B. 893.
(6) (1884) 10 App. Cas. 59.
(7) (1883) 8 App. Cas. 891.

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The question turns upon the combined effect of the statement of the law by Bray J. in *Stewart* v. *Thames Conservators* (1) and the decision of the House of Lords in *Associated Newspapers* v. *City of London Corporation*. (2) Bray J. said: "It has been laid down quite clearly that, where an Act of Parliament contains an exemption from all Parliamentary rates and taxes, that means, in the absence of any special words, rates and taxes existing at the time when the Act in question was passed, and the exemption does not extend to any rates or taxes subsequently imposed." That statement of the law was made by Bray J. sitting as a judge of first instance after the decision in the *Sion College Case* (3) in the Court of Appeal, and undoubtedly he stated the law as it appeared in the books, not by any wrong interpretation of the profession, but as it appeared in the judicial interpretation of the law in the *Sion College Case* (3) at the date when Bray J. made the statement.

On behalf of the appellants in the present case it has been contended that that principle of construction, which distinguishes between rates and taxes existing at the date of the exempting statute and rates and taxes thereafter imposed, has been entirely abrogated by the decision in *Associated Newspapers* v. *City of London Corporation*. (2) On behalf of the Crown it was, on the contrary, contended that that principle has only been done away with as regards local, and not as regards Parliamentary, taxes.

It would certainly appear to be strange that different treatment should be accorded to words, when the question arises with regard to present or future taxes, according as their subject-matter is a local or a parliamentary burden. As regards the inclusion or exclusion of future taxes, it does not, at first sight, appear why a distinction should be drawn based upon the nature of the tax itself, but the decision of the House of Lords in the *Associated Newspapers Case* (2) must be examined in order to ascertain the true effect of it. In that case the point arose under the statute which had given rise to the *Sion College Case* (3) and the same point (a hundred

(1) [1908] 1 K. B. 893, 903. (2) [1916] 2 A. C. 429.
(3) [1901] 1 K. B. 617.

years ago) gave rise to *Williams* v. *Pritchard* (1), where a statute vested land reclaimed from the River Thames in the owners of the adjoining land and wharves "free from all taxes and assessments whatsoever." In *Associated Newspapers* v. *City of London Corporation* (2) the question was as to local rates, and the appellants contended that they were not chargeable to those local rates, but they had no concern with the question of parliamentary rates, nor did they contend that the exemption applied to parliamentary taxes. The learned Lords, in their several speeches advising the House, all made it clear that they were not dealing with parliamentary taxes. It might be that some future litigant would contend that he was exempt from parliamentary taxes by force of the exemption granted by the statute, although the appellants in that case were not setting up that contention, and therefore one can understand the question being left open. It may be that the House of Lords did more than that, but at any rate it is quite reasonable to suppose that they would do that. The decision of the majority was given by Viscount Haldane, Lord Parmoor and Lord Wrenbury, and it is necessary to ascertain exactly what they said. They were dealing with the question whether words of exemption similar to those in the present case were limited to existing burdens, and Viscount Haldane said: (3) "One of these points is whether the natural meaning of the exempting words extends to future taxes and assessments. . . . ." He then refers to the authorities which were thought to have decided that question, and which led up to the state of the law formulated by Bray J. after the decision of the Court of Appeal in the *Sion College Case.* (4) He refers to *Williams* v. *Pritchard* (1); *Eddington* v. *Borman* (5); *Perchard* v. *Heywood* (6); and *Rex* v. *London Gas Light and Coke Co.* (7)

Williams v. *Pritchard* (1) and *Eddington* v. *Borman* (5) respectively related to the land tax—a tax which had been imposed since the reign of William and Mary, although

(1) 4 T. R. 2.
(2) 1916 2 A. C. 429.
(3) [1916] 2 A. C. 439.
(4) [1901] 1 K. B. 617.
(5) 4 T. R. 4.
(6) 8 T. R. 468.
(7) 8 B. & C. 54.

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by an annual Act—and to the paving rate, established by 11 Geo. 3. In both those cases the decision was that there was an exemption upon the ground that the tax and rate were respectively old ones, and therefore the supposed distinction between impositions before and after the exempting Act did not arise. That is how I understand Viscount Haldane and the other members of the House dealt with those decisions. "The important point," said Viscount Haldane (1), "is that it was not necessary to decide, nor was it decided, that the exemption was restricted to existing taxes and assessments." He said that with special reference to *Perchard* v. *Heywood*. (2) *Perchard* v. *Heywood* (2) arose with regard to what was undoubtedly a parliamentary tax, namely, the window tax, a tax on houses estimated by the number of windows and not upon the value, as is inhabited house duty. In that case it was contended that the owner was exempt by reason of 7 Geo. 3, c. 37, s. 51, with regard to the reclamation of land from the Thames. Lord Kenyon found in the taxing statute, which imposed the house and window tax, a clause which negatived affirmatively, as he held, the exemption, and he adds: "though even without that I should have been of opinion that the plaintiff could not recover in this case"—perhaps alluding to the contention that the tax was a new tax, and therefore not within the exemption. Dealing with that decision, although Viscount Haldane said that it was not necessary to decide, nor was it decided, that the exemption was restricted to existing rates and assessments, I think it is worthy of remark that if it had been in his mind to point out carefully that he was only overruling the supposed rule of construction with regard to local taxes, he would have said: "In any event *Perchard* v. *Heywood* (2) was dealing with a parliamentary tax as to which different considerations may apply," or something to that effect, but he says nothing of the kind. It is perfectly true that throughout their judgments in the *Associated Newspapers Case* (3) the members of the House

(1) [1916] 2 A. C. 441. (2) 8 T. R. 468, 473.
(3) [1916] 2 A. C. 429.

said that they were dealing only in that particular case with local taxes, and Viscount Haldane said (1): "My Lords, these words"—meaning the words of exemption—"occur in a public statute. Whether they bear an analogy, as has been said, to the terms of a bargain between the City and the wharfowners does not seem to me important, excepting on one point. I think that from the context and purpose with which it is introduced the expression 'taxes' means local and not Imperial taxes, and that the exemption is confined to these." He is there saying in effect—as I understand him—that it rather looks like a bargain and, if so, it is a bargain about what the persons bargaining had to deal with, namely, local and not Imperial taxes. He continues: "But subject to this it appears to me that the words used by the Legislature are not ambiguous," and I think he means that that is the only ambiguity about it and that there is no ambiguity about the generality of the words qua past or qua future. He means that the only ambiguity (which was immaterial in that case, because the point was not raised) was whether it was confined to local taxes because it looked like a bargain, or whether it applied to all taxes. Lord Parmoor also referred to the point that they were only dealing with local taxes. He said: (2) "It was argued on behalf of the respondents that the charge imposed is small in comparison with the value of the exemption claimed, but it is impossible to reopen this question, or to attempt to test the sufficiency of a consideration settled in the year 1767." He continued: "It is, moreover, always within the competency of Parliament to repeal or modify a bargain, sanctioned by statute, if a proper case can be made for such repeal or modification. To prevent misunderstanding, I desire to add that, in my opinion, the bargain has no reference to Imperial as distinguished from local taxation: *Perchard* v. *Heywood*." (3) In those passages I understand Lord Parmoor to say, in effect: "I am not deciding anything about parliamentary taxation here; what I am saying does not govern

(1) [1916] 2 A. C. 442. (2) [1916] 2 A. C. 457, 458.
(3) 8 T. R. 468.

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that"; but I cannot find that Lord Parmoor is lending any countenance to the suggestion that a totally different rule of construction is to apply as to drawing or not drawing a distinction between past and future burdens with regard to local as distinguished from parliamentary taxation. The same observation applies to what Lord Wrenbury said: (1) "At the outset I set out of consideration Imperial taxes. For the purposes of this case I may assume, and do assume, that the exemption is confined to taxes and assessments as between the city as rating authority and the owner or occupier as the party rateable."

To sum up my view on this matter I cannot find that these learned Lords were doing more than pointing out what their decision was confined to. I cannot see that they are suggesting that the principle is different on the material point now before me, according as parliamentary or local rates are being dealt with. I am therefore of opinion that this appeal must succeed. The circumstance that the tax has long been paid, and that certain classes of statutes are mentioned in s. 187 of the Income Tax Act, 1842, does not seem to me to affect my decision in any way. The appeal must, therefore, be allowed with costs.

Sir John Simon K.C. The amount of the assessment under appeal has been paid, and under s. 59, sub-s. 4, of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), the appellants are entitled to repayment of that amount, together with such interest thereon as the Court may allow: *Egyptian Hotels* v. *Mitchell.* (2) In that case commercial interest was allowed at the rate of 4 per cent.

ROWLATT J. Take interest at 5 per cent.

Appeal allowed.

Solicitors for appellants: *Walker, Martineau & Co.*
Solicitor for Crown: *Solicitor of Inland Revenue.*

(1) [1916] 2 A. C. 460.

(2) (1914) 6 Tax. Cas. 542, 548.

J. E. A.

WELLER, Appellants *v.* COMMISSIONERS OF INLAND REVENUE, Respondents.

1919
April 29.

Revenue—Excess Profits Duty—Balance of Profits and Gains—Deductions—Tied Houses—Loss on Rents—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 40, *sub-s.* 1, *Fourth Sched., Part I., Rule* 2.

Sect. 40, sub-s. 1, of the Finance (No. 2) Act, 1915 (which by Part III. imposes excess profits duty), enacts that: "The profits arising from any trade or business to which this Part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act."

5. The Fourth Schedule, Part I., Rule 2, of the Act enacts that: "The principle of the Income Tax Acts under which . . . . profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business are excluded shall not be followed."

The appellants, a firm of brewers, appealed against two assessments to excess profits duty for accounting periods ended respectively December 31, 1914, and December 31, 1915, made upon them by the Commissioners of Inland Revenue under the provisions of the Act of 1915 and subsequent enactments. The appellants were the owners of certain freehold tied houses which they held solely for the purposes of their trade as brewers, and which they let to tenants at rents less than the annual value of the houses. The appellants' profits as shown by their accounts for the years ended December 31, 1914, and December 31, 1915, respectively included the rents received in respect of the freehold tied houses, and were arrived at without making any allowance for the differences between those rents and the gross annual value of the freehold tied houses as assessed to income tax under Sched. A, which allowance has admittedly to be made in determining the profits for the purpose of income tax under Sched. D:—

Held, that the differences between the amounts of the rents received by the appellants in respect of the freehold tied houses and the gross annual value of those houses as assessed to income tax under Sched. A were not "profits or gains arising from lands, tenements or hereditaments" within Rule 2 of the Fourth Schedule, Part I., of the Act of 1915, but were a loss, and that those differences were deductible in determining the profits arising to the appellants from their trade for excess profit duty purposes.

Case stated under the Finance (No. 2) Act, 1915, s. 45, sub-s. 5, and the Taxes Management Act, 1880, s. 59, by the commissioners for the special purposes of the Income Tax Acts.

At a meeting of the commissioners held on July 19, 1917,

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the appellants, W. & G. Weller, appealed against two assessments to excess profits duty in the respective sums of 650*l.* and 780*l.* for accounting periods ended respectively December 31, 1914, and December 31, 1915, made upon them by the respondents, the Commissioners of Inland Revenue, under the provisions of the Finance (No. 2) Act, 1915, Part III., and subsequent enactments.

The appellants were brewers of The Brewery, Amersham, Buckinghamshire, and were the owners of certain freehold and leasehold tied houses which they held solely for the purposes of their trade as brewers and which they let to tenants at rents which in the case of the freehold houses were less than the annual value of the houses, and in the case of leasehold houses were less than the rents they themselves paid to their superior landlords.

The appellants' profits as shown by their accounts amounted to 11,390*l.* for the year ended December 31, 1914, and 10,851*l.* for the year ended December 31, 1915. These profits included respectively the sums of 2421*l.* and 2447*l.* (being the amounts of the rents received in respect of the freehold tied houses), and were arrived at without making any allowance for the sums of 1632*l.* and 1611*l.* (being the differences between those rents and the gross annual value of the freehold tied houses as assessed to Income Tax under Sched. A—namely, 4053*l.* for 1914, and 4058*l.* for 1915), which allowance has admittedly to be made in determining the profits for the purpose of Income Tax under Sched. D.

Sect. 40, sub-s. 1, of the Finance (No. 2) Act, 1915 (which by Part III. imposes excess profits duty), enacts that: "The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purpose of this part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act."

The Fourth Schedule, Part I., Rule 2, of the above-mentioned

Act, enacts that: "The principle of the Income Tax Acts under which deductions are not allowed for interest on money borrowed for the purpose of the trade or business, or for rent or royalties, or for other payments income tax on which is collected at the source (not being payments of dividends or payments for the distribution of profits), and under which profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business are excluded shall not be followed."

The question for the opinion of the Court was whether the allowance for the sums of 1632*l.* and 1611*l.* above mentioned should be made in determining the profits arising to the appellants from their trade or business for excess profits duty purposes, as admittedly it has to be made for income tax purposes.

On behalf of the appellants it was contended (1.) That the judgment of the House of Lords in *Usher's Wiltshire Brewery* v. *Bruce* (1) made it clear that the difference between the gross Sched. A assessments of the freehold tied houses and the rents received from the tied tenants thereof (hereinafter referred to as the item of deficiency of rents) was, as was admitted, deductible as a trade expense, and that as for the purposes of excess profits duty the profits must be determined on the same principles as they would be determined for income tax purposes under Sched. D with certain exceptions not including the item of deficiency of rents, this difference should be specifically deducted from the profits in arriving at the profits assessable to excess profits duty.

(2.) That the provision in the Act of 1915, Sched. 4, Part I., Rule 2, that certain exceptions are to be made to the general rule that the principles of income tax are to be applied to excess profits duty, does not refer to the item of deficiency of rents, but is intended to bring into computation of excess profits duty those items which are excluded from an income tax Sched. D account, either (*a*) because they are taxed for income tax by deduction at the source or (*b*) because they are taxed for income tax under another schedule—namely, in the case of profits from lands under Sched. A.

(1) [1915] A. C. 433; 6 Tax. Cas. 399.

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(3.) That the sum to be included in the excess profits duty computation as representing the profits arising from the freehold tied houses in order to meet the requirements of the Fourth Schedule, was the rents received from the tied tenants which rents (together with any other income of the appellants received by them less income tax, or which was accounted for as regards income tax under some schedule other than Sched. D) should be added to the income tax Sched. D figure of profits to arrive at the excess profits duty figure of profit and were so added and duly accounted for by them as the respondents admitted.

(4.) That the item of deficiency of rents is not a profit arising from lands but a loss arising from lands.

On behalf of the respondents it was contended (inter alia) that no allowance for the sums of 1632*l.* and 1611*l.* should be made in arriving at the profits of the appellants for excess profits duty purposes.

The special commissioners were informed on behalf of the respondents that the figures of the assessments set out above were excessive in the light of information since the assessments were made, and that in the event of their decision being in favour of the respondents the assessments should be reduced to :

	£	*s.*	*d.*
For the accounting period to December 31, 1914	162	0	0
Less deficiency for the accounting period to December 31, 1915	29	8	0
	£132	12	0

On August 14, 1917, the special commissioners gave their decision as follows : "To arrive at the correct figure of profit for the purposes of the excess profits tax the profits and gains arising to the appellants from their tied houses must be included in the computation."

"The appellants hold these houses for the purpose of their trade and admittedly accept rents less than the annual value of the houses because by so doing they increase their sales and profits. In arriving at the figure of profit liable to

income tax Sched. D, the difference between the Sched. A assessments on these houses and the rents received from the tied tenants has been deducted from the appellants' receipts because in order to earn those receipts and to increase their sales and profits they have let at reduced rents property which they might have let to free tenants at the full annexed value. The difference which they might have obtained in the shape of rents, they have in fact received in the shape of increased receipts from the sale of beer. Since this portion of their receipts is excluded in determining their trade profits it must be regarded as arising from the property."

"We hold that the profits and gains arising from these tied houses to be included in the computation must not be only the rents received from the tenants, but those rents plus that part of the 'increased trade' done in the tied houses which has been deducted from the appellants' receipts in arriving at the income tax Sched. D assessment as a 'deficiency of rents' deduction, and as all the expenses have been deducted in arriving at the appellants' profits from trade, the receipts from the tied houses constitute profits without deduction."

"The correct computation for the purposes of the excess profits tax will, in our opinion, be therefore the Sched. D figure of profit (since both sides agree to use that as a starting figure) plus the Sched. A assessment on the brewery premises (upon which no question arises) plus the rents received from the tenants, plus the 'increased trade' figure."

"This 'increased trade' figure plus the rents received may be taken as equal to the Sched. A on the said houses, and we therefore reduce the assessment for the accounting period to December 31, 1914, to 162*l.*, less for period to December 31, 1915, deficiency of 29*l.* 8*s.*"

Ryde K.C. and *A. M. Latter* for the appellants. There is no dispute that the allowance sought to be made by the appellants in arriving at their profits for the purpose of excess profits duty is permissible for the purpose of income tax. That point was decided in *Usher's Wiltshire Brewery* v. *Bruce* (1) and *Smith* v. *Lion Brewery Co.* (2), and therefore

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cannot be disputed, and is conceded by the respondents. The allowance is also permissible for the purpose of the excess profits duty. There is no relevant modification of the principle for excess profits duty purposes, in the Fourth Schedule, Part I., Rule 2, of the Finance (No. 2) Act, 1915. The words "profits or gains" would be most inappropriate to the present case where the appellants qua landowners suffer a loss.

The profits made from the manufacture and sale of beer arise from the trade and from the houses being tied to the brewer; not from the ownership of the land on which the houses stand. Take a freehold house, for instance, worth 100*l.* a year let by the appellants who are the freeholders at 60*l.* instead of 100*l.* subject to the tie. That means a loss to the appellants on that house, qua landlords, of 40*l.* That loss of 40*l.*, and probably much more, the appellants recover from the increased trade which accrues to them by virtue of the tie—not because they are landowners. If the publican himself, as might quite possibly happen, were liable to excess profits, he would be chargeable on his profits made as a retailer, and then the respondents would say to him in effect "in addition to your retail business you are in a sense part owner of the public-house; it is worth 100*l.*, and you only pay 60*l.* for it. We are going to charge you that 40*l.* of the value of this house in addition to your trading profits." That 40*l.* would come in as an addition to the publican's trade profit, and, as it is part of the brewer's trade profit it would, if the decision of the commissioners is right, be used twice over, and the Crown would get the benefit of it in both cases. That cannot be supported.

[*Russell* v. *Town and County Bank* (1) was also referred to.]

Sir Gordon Hewart A.-G. and *T. H. Parr* for the respondents. The substance of the provision contained in the Fourth Schedule, Part 1, Rule 2, of the Finance (No. 2) Act, 1915, is that for the purposes of excess profits duty the profits or gains arising from lands, tenements, or hereditaments forming part of the trade or business are to be included. Therefore for the purposes of excess profits duty one has to look at the

(1) (1888) 13 App. Cas. 418.

totality of profits or gains, and certain elements are to be included which are excluded for the purpose of income tax. It follows that the respondents are entitled to take into account not only the profits and gains derived by the appellants directly from the business, but also under the rule, the profits of the lands, that is to say the profits of the freehold houses. In *Usher's Case* (1) the result was that the whole profits and gains of the brewery company were taxed, and if the decision had been otherwise there would have been a double taxation. To take a round figure. Suppose that the profits derived from the sale of liquor were 25,000*l.* and the margin between the actual rent and the annual value was 1000*l.* The appellants, if the law had not been as declared by *Usher's Case* (1), would have been liable to pay income tax upon the whole sum of 25,000*l.* But that decision shows that they are entited to say: "We decided to forego a sum of 1000*l.* which we might have received as rent; that item is an expense or loss, and we diminish by that amount the sum of 25,000*l.*" But the tax would be suffered upon that 1000*l.* not under Sched. D but under Sched. A. For the purposes of excess profits duty it is expressly provided that profits or gains arising from lands are to be included. The profits or gains derivable by the brewers are the whole annual value of the freehold houses. It is true that the actual rent paid is less than the annual value; but, so far as it is a less sum, the appellants have depleted pro tanto the profits they have received under Sched. D, and if, after that operation, they are to say "We will now further deplete the total by the difference between these two rents," they are having the advantage of that difference twice. The profits actually physically received are 25,000*l.*, but for the purpose of income tax they are permitted to deduct the 1000*l.* because that is something which they might have received, and deliberately decided not to receive. For the purposes of excess profits duty they can either take the gross figure, the 25,000*l.*, and the actual rent, or they can take the diminished figure of 24,000*l.* and the total rent, but if they are allowed to

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say " we will first diminish our profits by 1000*l.*, because we do not receive that rent," and then afterwards treat the rent which they did receive as the whole of the profits arising from these lands they would be having the benefit of the deficiency of the rent twice over, first under the heading of profits from lands, and secondly as a factor for the reduction of the profits which they have actually received and which, but for that deduction, would be fully taxable under Sched. D. The problem in dealing with excess profits duty is to ascertain the totality of the profits for a particular period, and to contrast them with the totality of the profits for a certain other period. It matters not under what schedule a particular ingredient in those profits may be taxable. One has to ascertain the whole. The Income Tax Acts tax a brewer in two capacities, one as a brewer who sells liquor; the other as an owner of property; and, for the purposes of income tax a clear distinction is drawn between the two. It is a double operation. But, for the purposes of excess profits duty, those distinctions are not drawn. Whether there be a gain qua brewer or qua owner of property matters not. The question is what is the total, and if the contention on behalf of the appellants were to succeed, the effect would be that, so far as excess profits duty is concerned, though not so far as income tax is concerned, there would be a lacuna—a gap represented by the difference between the two rents. And indeed if the contention were sound the annual value of the brewery itself ought to be deducted, for it would follow that the appellants might logically say: " We should not earn our profits as brewers which, for income tax purposes, appear under Sched. D without a brewery." But it has never been suggested that the annual value of the brewery should be treated in that way, the reason being that it is recognized that the annual value of the brewery, although they receive nothing directly for it, is an asset of their business.

Ryde K.C. in reply. In construing Rule 2 of the Fourth Schedule of the Finance (No. 2) Act, 1915, even if there were any escaping taxation (which it is not desired to admit) the brewers can only be taxed on any profits they make, including

that part of the profits (if any) arising from the lands represented by the tied public-houses which they receive. That is the total for which the brewers are liable to be taxed.

The contention of the appellants is merely an application of the principle of *Usher's Case* (1) to excess profits duty, and complies with the rule that where they occupy land for the purposes of their trade, the whole of the rental value of the land so occupied must come into account, but where they receive part of the profits of the land only, that part only goes into account, and the rest is chargeable, if at all, to excess profits duty against the tenant. It might frequently happen as between landlord and tenant that something might escape taxation because the tenant might be within the limit for the time being in force which confers exemption from income tax. In that case the property might escape taxation altogether under Sched. A or any schedule. So in the present case if the tenant is liable to excess profits duty, the loss which the appellants have deducted will come into account as an element of his property in taxing him. If he is not liable to excess profits duty it will escape taxation not because it has escaped the net of taxation, but because there is no person who is liable to pay it. A loss incurred in order to earn a larger profit cannot be turned into any form of profits or gains arising from lands within the meaning of the rule.

ROWLATT J. In this case the appellants, who are brewers, own their brewery premises, and certain tied houses which they let to tenants at a rent less than the annual value, making a sacrifice of the difference in order to obtain a tie from the tenant, and the trade advantages which accrue therefrom. Under those circumstances they pay income tax under Sched. A on their brewery premises which they occupy for the purpose of brewing. They also pay, by deduction, the rate in the pound of the prevailing income tax on the amount of the rent paid by the tenant to them. The tenant bears (whether the brewers make it up to him I do not know, and it is immaterial) the income tax on the remaining part of the

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annual value—namely, that part by which it exceeds the rent he pays. In addition the brewers under Sched. D pay income tax on the profits of their trade as brewers, that is to say the difference between what they sell their beer for and what it costs them to produce it; and brewers were held by the House of Lords in *Usher's Wiltshire Brewery* v. *Bruce* (1) to be entitled for the purposes of income tax to deduct from that brewing profit the loss they have made in letting tied houses at a rent less than their annual value. For the purposes of income tax therefore the whole of the profits of the brewing trade are taxed, and further the whole of the brewery premises are taxed to their full annual value. The whole of the licensed houses also provide a tax to the Government on their full annual value, partly at the expense of the brewers, and partly at the expense of the tenant who has the balance value of the occupation without any rent. With regard to excess profits duty it is declared by Rule 2 of the Fourth Schedule of Part I. of the Finance (No. 2) Act, 1915, as follows: "The principle of the Income Tax Acts under which . . . . profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business are excluded shall not be followed." In other words, the profits and gains arising from lands, tenements or hereditaments forming parts of the assets of the trade or business are to be included.

Among the profits which must be included are the profits or gains represented by the annual value of the brewery premises which the brewers occupy and the profits and gains consisting of the landlord's property in the houses which are let, represented by the rent which comes to him on which he suffers tax by deduction. But the commissioners have decided, and this is the point in this appeal, that there must also be included the amount by which the rents of these houses fall short of the annual value of the houses; in other words, that that amount having been deducted in accordance with the decision of the House of Lords in *Usher's Case* (1) in arriving at the profits and gains of the brewery business as being an expense incurred by the brewers—namely, the sacrifice of a

(1) [1915] A. C. 433.

certain amount of the annual value of their houses in order to earn their profits, it should be added again under the words "profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business."

The commissioners have taken the view that the receipts of the brewery business have been increased by the low rental accepted which has earned the tie—if I may use the expression—and, therefore, they say, that portion of the receipts—that is, the portion corresponding to the difference—must be regarded as arising from the property; that is to say as arising, within the meaning of the rule, "from lands, tenements, or hereditaments." The answer is that it does not so arise, and it does not help matters to say that it must be regarded as so arising. The brewers have sacrificed this amount of the rental value of their houses. They hoped to obtain, and probably did obtain, an extended trade by it. They may have obtained none, or they may have obtained some amount, but less than the difference which they sacrificed in rent. It is extremely improbable that they obtained the exact amount. They probably obtained a good deal more in the way of increased trade than they lost by sacrifice of rent. But those profits which they did obtain are profits of the trade; trade profits which they have obtained by sacrificing another form of income—namely, income from house property—and it does not advance matters in the least to say that some part of these receipts must be regarded as arising from property. That is not a formidable way of supporting the respondents' case, and it was not so put by the Attorney-General, at which I was not surprised. The effect of his contention upon behalf of the respondents was, in substance, that the excess profits duty takes no account of schedules. The totality of the profits must be regarded, and in the present case there is the trade and the real property, and the business is not to be debited with the rent, as is done in income tax, but the whole resources of the concern are to be brought in. That is quite right, but what is the totality? It seems to me that the totality must be the totality including the profits and gains which come to the brewer. It is perfectly true that the totality of the tax-

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bearing subject-matter is more than that, because the totality of the tax-bearing matter consists of the houses to the extent of their full annual value and the trade to the extent of its full annual value. But the brewers do not in fact obtain all that. They obtain the rent of the houses which they actually receive, and the profits of the trade which they actually receive, but less the amount of rent which they sacrifice, because the rent which they sacrifice on the lands they own is in just the same position as the difference of rent which they sacrifice in the case of houses which they hire at one rent and let at a lower rent. That is, I think, the effect of what Lord Sumner said in *Usher's Wiltshire Brewery* v. *Bruce*. (1) A trader who provides property for the use of his trade incurs an expense represented by the annual value of that property for the purpose of his trade. The brewers, therefore, do not obtain in cash more than the rents they receive, and the profits which they receive from their trade of selling beer, less the difference of rents which they sacrifice, and, they also have the occupation, which is a profit, of the premises which they themselves occupy for their brewery purposes. I therefore do not think that it assists the discussion to say that the totality must be looked at any more than does the curious language used by the commissioners. If it is only the totality received by the brewers which is material, that totality does not extend to more than they contend they ought to be taxed upon according to the argument upon their behalf. It may be that they might have been taxed upon the total value of the houses which they own irrespectively of the fact that part of the ownership value does not go to them because they have given it to the tenant. But with regard to the words "profits or gains arising from lands, tenements, or hereditaments forming part of the assets of the trade or business," when I consider that the profits and gains which would have been taxed to income tax in their hands are only so much of the profits and gains as comes to them in rent, because the tenant cannot deduct income tax except to the extent of so much in the pound of his rent, I am quite unable to come to any other

(1) [1915] A. C. 433, 469.

conclusion but that the decision of the commissioners was wrong, and that I must allow this appeal with costs.

Appeal allowed.

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Rowlatt J.

Solicitors for appellants: *Godden, Holme & Ward.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. E. A.

WHITTAKER, APPELLANT *v.* FORSHAW, RESPONDENT.

1919

May 13.

Adulteration—Sale of Milk to Prejudice of Purchaser—Authority of Agent—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 6—*Sale of Food and Drugs Act Amendment Act*, 1879 (42 & 43 *Vict. c.* 30), *ss.* 3, 4.

The respondent's daughter, aged thirteen years, in accordance with her usual practice and general instructions from the respondent, a farmer, took each morning a pint of milk from the respondent's farm-house in a can to deliver at the dwelling-house of a customer in fulfilment of an order previously given by the customer. The respondent entrusted his daughter with the pint of milk for the purpose only of delivering it to the customer. On one particular morning an inspector under the Food and Drugs Acts met the daughter as she was carrying the pint of milk to the customer's dwelling house but before she had arrived there, and demanded to purchase from her a pint of milk which she delivered to him out of the can containing the pint of milk intended for the customer. The milk so sold to the inspector contained added water to the extent of 24 per cent. The daughter delivered the milk to the inspector because he demanded it and because "some people are fined for not doing as the policemen tell them." On an information against the respondent for selling milk to the prejudice of the purchaser, justices held that the daughter had no authority to sell the pint of milk to the inspector, but in fact delivered it to him because she was afraid to refuse it after his demand, and that consequently there was no sale by the respondent to the prejudice of the inspector. On a case being stated by the justices:—

Held, by the Divisional Court (Darling and Salter JJ., Avory J. dissenting), that the justices were entitled to find that the daughter had no authority to make any contract of sale, inasmuch as her instructions were limited to carrying the milk.

Lindsay v. *Dempster* 1912 S. C. (J.) 110 followed.

Houghton v. *Mundy* (1910) 103 L. T. 60 distinguished.

CASE stated by justices for the county of Lancaster.

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The appellant, Whittaker, a superintendent of police, preferred an information against the respondent, John Forshaw, a farmer at Croston, in the county of Lancaster, before the justices, under the Sale of Food and Drugs Acts, 1875 and 1879, for selling milk to the prejudice of the purchaser which was not of the nature, substance and quality demanded by the purchaser. The milk, on analysis, was found to have 24 per cent. of water added.

The respondent for several years had sold milk to a limited number of customers only (seven), who were supplied by him at their houses, in accordance with orders previously given by them. Mrs. Hughes and Miss Butler were two of these customers, and on October 16, 1918, the respondent set apart a pint of milk in a quart can for Mrs. Hughes and a quart in another can for Miss Butler, which two cans the respondent's daughter, Elizabeth Forshaw, aged 13 years, in accordance with her usual practice and instructions from the respondent, took from off the table at the farmhouse of the respondent to deliver at the dwelling houses of Mrs. Hughes and Miss Butler respectively, and to whom she had so delivered milk each morning for a year in accordance with her instructions from the respondent. Thomas Williams, an Inspector of Police, was duly acting as an Inspector under the Food and Drugs Acts on October 16, 1918, in Town Road, Croston, accompanied by another police officer. At 8 A.M. on that day Williams, whilst in the act of taking samples from a person retailing milk from a milk cart in Town Road, saw Elizabeth Forshaw passing along Town Road carrying two cans each of a capacity of not exceeding one quart, apparently containing milk, and addressing Elizabeth Forshaw said: "I want some from you," and she waited on the road until he had completed taking a sample from the other person, after which he demanded to purchase from Elizabeth Forshaw a pint of milk which she delivered to him out of one of the two cans she was carrying, being the whole of its contents, and for which he paid the sum of threepence-halfpenny, when he informed her that he had purchased the pint of milk for the purpose of analysis by the Public Analyst. The pint of milk so obtained

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was then divided by Williams into three parts and each part sealed and labelled. One part was given to Elizabeth Forshaw with instructions to give it to her father the respondent, the second portion was sent on the same day to the Public Analyst of the district in accordance with s. 14 of the Sale of Food and Drugs Acts, 1875, and the third part was retained by Williams.

The Public Analyst certified that the part sent to him contained added water to the extent of 24 per cent.

The justices found that the milk so sold to Williams was as certified by the Public Analyst, and contained added water when sold to Williams, but by whom the water was added they could not say.

The milk delivered by Elizabeth Forshaw to Williams was the pint of milk in a separate quart can intended for Mrs. Hughes, and should have been delivered at the dwelling house of Mrs. Hughes, but was not delivered at that place. Elizabeth Forshaw delivered the milk to Williams because he demanded it, and in the belief, as she stated, that "some people are fined for not doing as the policemen tell them," and she afterwards returned to the respondent's farm and obtained another pint of milk and delivered it to Mrs. Hughes. Elizabeth Forshaw had received no particular instructions from the respondent on the morning of October 16, 1918, to deal with the pint of milk so delivered to Williams, but the justices found that she had previously received general instructions from the respondent to deliver each morning to Mrs. Hughes a pint of milk, and that for that purpose only she was entrusted by the respondent with the pint of milk.

On the part of the appellant it was contended :—

(*a*) That the sale by Elizabeth Forshaw was a sale by the respondent through his servant and agent.

(*b*) That Elizabeth Forshaw was a person entrusted for the time being with the charge of the pint of milk whilst in the course of delivery to Mrs. Hughes, and so had implied authority to deliver the pint of milk to Williams by virtue of a sale or otherwise.

(*c*) That upon the sale Williams did not receive the article

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of food of the nature, quality and substance of the article demanded by him and so was prejudiced.

On the part of the respondent it was contended :—

(*a*) That there was no sale nor exposure for sale by the respondent.

(*b*) That Elizabeth Forshaw was merely an agent to make delivery of the milk in question which was already sold and appropriated to Mrs. Hughes.

(*c*) That the transaction between Elizabeth Forshaw and Williams was without the knowledge or authority express or implied of the respondent and the respondent was not criminally responsible for his daughter's act.

(*d*) That the sale of the pint of milk was not a procuring of a sample in accordance with s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879.

The attention of the justices was called to the following cases :—

(*a*) *Lindsay* v. *Dempster*. (1)

(*b*) *Semple* v. *Dunbar*. (2)

(*c*) *Helliwell* v. *Haskins*. (3)

The justices were of opinion and found that Elizabeth Forshaw had no authority to sell the pint of milk to Williams, as the milk had been set apart at the farm for a specific customer to be delivered at the customer's house according to an order previously given by the customer, but did in fact deliver it to him because she was afraid to refuse it after his demand, and consequently there was no sale by the respondent to the prejudice of Williams, and further that the sample was not taken at the place of delivery as required by s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879.

The question for the opinion of the Court was whether the justices upon the above statement of facts came to a correct determination in point of law.

Wingate-Saul for the appellant. The justices were wrong. The girl was employed in the general business of selling milk

(1) 1912 S. C. (J.) 110. (2) (1904) 6 F. (Just. Cas.) 65.
(3) (1911) 75 J. P. 435.

to a number of the respondent's customers, and if she went outside her instructions in selling it to the inspector, the respondent is nevertheless liable : *Brown* v. *Foot.* (1) *Lindsay* v. *Dempster* (2) is not in accordance with *Houghton* v. *Mundy* (3), and ought not to be followed. If milk cannot be bought by an inspector in the manner which was adopted in the present case there will be little protection for the public. In a neighbourhood where an inspector is known it is impracticable to take proceedings under s. 3 of the Sale of Food and Drugs Act Amendment Act 1879 because the sample must be taken at the place of delivery, and the most reasonable method of proceeding is that which is provided by s. 6 of the Sale of Food and Drugs Act, 1875, and which was adopted in the present case. There was no sale to Mrs. Hughes or Miss Butler because the milk had not been delivered to them : *Parker* v. *Alder.* (4) The sale to the inspector by the girl was not the less a sale, although it took place under compulsion. A dairyman is equally compelled to sell to an inspector under s. 4 of the Sale of Food and Drugs Act Amendment Act, 1879. There was a duty cast on the respondent of preventing his servants selling adulterated milk : *Commissioners of Police* v. *Cartman.* (5)

[DARLING J. It appears to me that the girl had no more authority to sell the milk than a postman has to sell the letters he carries. She was a mere messenger.]

The respondent could have personally sold the milk to the inspector because the property in it had not passed to Mrs. Hughes or Miss Butler, and although the girl in fact exceeded her authority she was acting within the scope of it, and the respondent ought therefore to have been convicted.

[The Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 5, clauses 1 and 2, and *Elder* v. *Bishop Auckland Co-operative Society* (6) were also referred to.]

The respondent did not appear.

AVORY J. There being a difference of opinion among the

(1) (1892) 66 L. T. 649.
(2) 1912 S. C. (J.) 110.
(3) 103 L. T. 60.
(4) [1899] 1 Q. B. 20.
(5) [1896] 1 Q. B. 655.
(6) (1917) 81 J. P. 202.

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members of the Court it falls to me to deliver judgment first. In my opinion the question arising for our decision is a very difficult one, especially in view of the decision of the Scotch Court in *Lindsay* v. *Dempster* (1), which is entitled to great respect and from which I hesitate to differ, but in my opinion the grounds of the decision of the justices, and which I understand commend themselves to the majority of this Court, are too refined for the practical application of the Sale of Food and Drugs Act, 1875. It has been said more than once in this court, both in reference to that statute and to the Licensing Acts, that the strict provisions of the Sale of Goods Act, 1893, are not always applicable to questions which arise when persons are prosecuted either under the Licensing Acts or under the Sale of Food and Drugs Act, 1875, for selling. It is necessary to inquire what the object of the Act of 1875 is. The primary object is to prevent adulteration, and to carry out that object inspectors are furnished with the power of purchasing a sample in a shop; they are also furnished with the power of taking a sample at the place of delivery of milk, and it is made compulsory upon any person who keeps a shop and upon his assistants to sell to the inspector. It is also made compulsory on a person who is delivering milk to allow a sample to be taken at the place of delivery. Those provisions are intended for the purpose of detecting adulteration. In the present case, on the facts as stated, there is no doubt that adulterated milk was being supplied by the respondent—milk adulterated with water was being supplied. It was in fact being sold by the respondent. I say "being sold" in order, for the moment, to leave open the question whether the property passed to Mrs. Hughes and Miss Butler. The respondent was therefore committing the offence against which the statute is aimed—namely, he was selling adulterated milk. That being established I confess I think the Court ought not to be astute to find a distinction between the case where a man himself sells under compulsion to an inspector, and where his messenger or carrier so sells. If the inspector had gone to the respondent's

(1) 1912 S. C. (J.) 110.

premises before the girl had started on her journey, and had there demanded a sample of the milk, there would have been no doubt that he would have been liable; but it is said that he is not liable because the girl had started on her journey with this adulterated milk for the purpose of delivering it to the purchaser.

Three questions arise: First, whether there was a sale by the girl to the inspector; secondly, whether there was a sale to the prejudice of the purchaser; thirdly, whether the respondent, the employer, is responsible for that sale. The justices have found that there was no sale by the girl, and the decision in *Lindsay* v. *Dempster* (1) appears to confirm that view. I gather that the view of the justices was based chiefly upon the finding in the case that she delivered the milk to the inspector because he demanded it, and in the belief that "some people are fined for not doing as the policeman tells them." In my opinion that did not prevent this being a sale by the girl to the inspector. Every sale under compulsion under the Sale of Food and Drugs Acts is nevertheless a sale. The shopkeeper or his assistant who is called upon by an inspector to deliver to him a sample of goods which the shopkeeper or the assistant knows perfectly well is adulterated sells only under compulsion; and he sells for the very same reason that the girl sold in the present case—namely, because he knows that some persons are fined for not doing as the inspector tells them. Although the girl did it under compulsion, in my opinion there was, nevertheless, for the purpose of these statutes a sale by the girl to the inspector.

The second question is—was it a sale to the prejudice of the purchaser? It is true that in the present case the charge was that it was a sale to Williams, the inspector. If it had been alleged to have been a sale by the respondent to Mrs. Hughes—assuming the provisions of the Sale of Goods Act, 1893, are to be strictly applied—it would appear that there was a completed sale by the respondent to her, and that the respondent would have had no answer to

(1) 1912 S. C. (J.) 110.

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the complaint that he had sold adulterated milk to her. But I think the case must be dealt with upon the footing that it was alleged to be a sale to the inspector. Sect. 2 of the Sale of Food and Drugs Act Amendment Act, 1879, provides in substance that although there is a sale to an inspector, it shall nevertheless be deemed to be a sale to the prejudice of the purchaser although he is an inspector and although he suspects that it is adulterated. It therefore appears to me that there was in this case a sale to the prejudice of the purchaser.

There remains the final and difficult question upon which there is a difference of opinion among the members of the Court. Is the respondent liable for this sale ? It is contended on his behalf that the girl had no authority to sell milk, and therefore she was not acting within the scope of any authority which she possessed. For myself I do not appreciate the distinction between the present case and *Houghton* v. *Mundy*. (1) There express directions had been given to the servant or agent not to sell a particular article which was upon the premises. Nevertheless he sold that article, and it was held that the master was liable. In the present case —to make it exactly analogous to that—if it had appeared that the respondent had expressly directed the girl not to sell any of this milk upon her way to Mrs. Hughes either to an inspector or to anybody else, he would still, on the authority of *Houghton* v. *Mundy* (1), have been held responsible as the person selling. There is a distinction between the present case and *Houghton* v. *Mundy* (1)—namely, that in *Houghton* v. *Mundy* (1) the person who sold the article was employed in the shop to sell other articles, but had no authority to sell the particular article. The position was therefore the same as if he had sold his master's watch to some person who came into the shop. He had no more authority to sell the particular article than he would have had to sell the watch. But in the present case it appears to me that the girl was in fact carrying out and performing the contract of sale of milk which the respondent had already made with Mrs. Hughes. The delivery was a necessary part of carrying out that contract

(1) 103 L. T. 60.

of sale. The girl was therefore authorized to carry out the contract, and in the course of her performance of that duty she sold the sample of milk. In my judgment it would be too fine a distinction for the practical purposes of these statutes to hold that the respondent is not responsible, having regard to the authorities which have clearly laid down that a master is liable for the unauthorized act of a servant who adulterates milk although he has been specifically directed not to adulterate it, and for the unauthorized act of a servant who sells something which he is not authorized to sell. For these reasons, although I express my opinion with diffidence in view of the opinion of the majority of the Court, I think the justices were wrong and ought to have convicted.

SALTER J. I differ with diffidence from my brother Avory in a matter of this kind, and certainly with regret, because no one has any sympathy with persons who commit this kind of offence, and as this was a bad case of adulteration, I should have been glad if the respondent could have been punished, but I have arrived at the conclusion that the justices were right in their decision.

The respondent might have been proceeded against in another way. A sample of the milk might have been taken at the door of Mrs. Hughes' house, and he might then have been prosecuted under s. 3 of the Sale of Food and Drugs Act Amendment Act, 1879, as upon a sale to Mrs. Hughes —or rather as upon a sale by him to the inspector which would then have been implied by law to have taken place. But that course was not taken. He was prosecuted under s. 6 of the Act of 1875, which forbids a sale of food to the prejudice of the purchaser, and it is therefore necessary for the prosecution to prove that the respondent did in fact sell this milk to the inspector to his prejudice. If there was a sale to the inspector it was doubtless to his prejudice. The question therefore is, has a sale by the respondent to the inspector of this pint of milk been proved? Now as he did not sell the milk himself it is necessary for the prosecution to prove, first, that the girl sold the milk to the inspector, and next,

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that in doing so she acted within the scope of an existing agency between the respondent and herself so that the sale is in fact a sale by the respondent. The justices, as I understand the case stated, have negatived both these propositions. They have found that the girl did not sell, and that if she did sell she did not act within the scope of any agency.

Upon the first question—i.e., whether the justices were entitled on the facts to find that the girl did not make a contract of sale of the milk to the inspector—she was not in my judgment bound to sell anything to him. Where goods are being exposed for sale, either in shops, or in barrows in the street, then a sale can be demanded and is refused at peril. But this girl was not hawking milk, and was not, I think, bound to sell. A sale was demanded in terms, and she did thereupon hand over the milk and took the 3½*d.* which was handed to her for its price, and I will therefore assume in favour of the prosecution that the justices were wrong in finding that there was no sale by the girl to the inspector, and that they were bound upon the facts to find that she did sell the milk to him.

Then comes the question was this a sale by the respondent? What were the terms of the agency then existing between himself and his daughter? The justices have found that she had no authority to sell the pint of milk to the inspector, and they give as their reason that the milk had already been appropriated. Whether that reason is right or not, I think they were entitled to find that the girl had no authority to make any contract of sale. She had no right because her father could give her no right if the milk was not his. If the property in the milk had passed to Mrs. Hughes when the child left the farm I think there is an end of the matter. Having regard to the provisions of s. 18, r. 5, of the Sale of Goods Act, 1893, I think it is at least very arguable that the property in this milk had passed to Mrs. Hughes before the child had started with it, but I am prepared to assume that it had not, and that the milk the girl was carrying was her father's property and not Mrs. Hughes'. Her instructions, which were no doubt implied, were to carry this

milk—not to sell it—to carry it to the destination. I think there is a fallacy in Mr. Wingate-Saul's ingenious suggestion that the instructions to the child were to sell the milk to Mrs. Hughes if it was still her father's milk when she arrived at the place of delivery. I do not think these were the instructions. There were no instructions to her to make any contract of sale with Mrs. Hughes about this milk, but simply to deliver it in pursuance of a contract of sale which the respondent had already made for himself. I therefore think the justices were warranted in finding, and I think they did find, that the girl had no authority from her father to make any contract of sale.

With regard to cases of which *Houghton* v. *Mundy* (1) is an example, where a salesman is publicly selling goods on behalf of an employer, and exceeds in some detail instructions given to him, as for example when, as in that case, he sells a particular pat of butter which he ought to have reserved, I think the position is entirely different. He is held out to sell, and because he is held out, the contract which he makes, although contrary to the instructions that he has privately received, binds the employer as against the purchaser. But if a salesman in a butterman's shop were to purport to sell his master's gold watch, there would not be a sale that would bind the master although the salesman is an agent to sell. This girl, I think, was not held out by her father as a seller. She was not hawking the milk, but only carrying specific quantities to particular persons. I think *Lindsay* v. *Dempster* (2) was rightly decided and the decision of the justices must be upheld.

DARLING J. In my opinion this appeal fails. I agree with the judgment of my brother Salter generally, and particularly with his reasons for distinguishing *Houghton* v. *Mundy* (1) from the present case. I also agree with the decision in *Lindsay* v. *Dempster* (2) in the Scotch Court. In that case it appears from a passage in the statement of the facts that "The said vanman was not employed by the respondent to

(1) 103 L. T. 60. (2) 1912 S. C. (J.) 110.

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sell milk, but only to deliver it." I should agree with the argument Mr. Wingate-Saul has addressed to us if this were a case where a person employed to sell exceeds his authority by selling articles which he has been told not to sell. But that is a totally different case from *Lindsay* v. *Dempster* (1) and from the present case, where a person who is employed for a limited purpose only, such as to deliver goods, assumes the power and authority to sell them. In the present case I also think that the milk before the girl took it from the respondent's farm was the property of the customers, Mrs. Hughes and Miss Butler, and that the girl therefore could not lawfully sell it. I think that she was, as the vanman was in *Lindsay* v. *Dempster* (1), merely a person employed to deliver that which had been already sold, and therefore the authorities which deal with the scope of authority of a salesman are beside the matter altogether. The position in which she was reminded me, from the moment she was mentioned, of the case—earlier in date than *Lindsay* v. *Dempster* (1) or *Brown* v. *Foot* (2)—of Lucy Gray, which is almost exactly parallel. Lucy Gray's father said :—

> "To-night will be a stormy night—
> You to the town must go ;
> And take a lantern, child, to light
> Your mother through the snow."

If Lucy Gray had sold the lantern or had met the village policeman and, because he said "Sell me the lantern," had affected to sell it to him, the result would in law have been exactly the same as that which follows from that which the girl did in the present case. Lucy Gray had just as much right to sell her father's lantern to the policeman or to Mr. Wordsworth, if she had met him, as the girl Elizabeth Forshaw had to sell Mr. Hughes' and Miss Butler's milk to Williams, the constable. For these reasons I think the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Snow, Fox & Higginson, for Sir Harcourt Clare, Preston.*

(1) 1912 S. C. (J.) 110. (2) 66 L. T. 649.

J. E. A.

In re AN ARBITRATION BETWEEN FISCHEL & COMPANY AND MANN & COOK.

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May 22.

Arbitration—Procedure under Commercial Rules—Special Case—Request for by Party—Refusal by Umpire—Misconduct—Setting aside Award—Discretion of Court—Arbitration Act, 1889 (52 & 53 *Vict. c.* 49), *ss.* 10, 11, 19.

The Court has not only jurisdiction, but also a free discretion to require a commercial tribunal of arbitration having its own rules of procedure, at any stage of the proceedings before it, to state a case for the opinion of the Court upon a question of law apparently substantial and raised in good faith.

A contract for the sale of goods contained a clause providing that any dispute arising out of the contract should be settled by arbitration according to the rules of a commercial association of which the parties to the contract were members. These rules provided for the reference of disputes to arbitrators and if they could not agree to an umpire, and for an appeal to a committee of appeal. Disputes between the parties were referred to arbitration under the rules, and arbitrators and an umpire were appointed. On being appointed the arbitrators and the umpire were informed by the buyers that they required a case to be stated for the Court on questions of law which were prima facie substantial, and, subsequently, when the matter was before the umpire the buyers more than once requested him to state a case, and informed him that if he declined they would have to apply to the Court for an order directing him to do so. The umpire, however, being of opinion that the Court in its discretion would not require the tribunal to state a case until all the stages of its procedure had been passed through, refused to state a case, and made his award not in the form of a special case. The buyers moved to set aside the award on the ground of the misconduct of the umpire in failing to state a case and in other respects:—

Held, that the umpire in disregarding the request of the buyers to state a case, and in making his award otherwise than in the form of a special case, had been guilty of misconduct which was more than merely technical, and that the Court in its discretion should set aside the award.

MOTION to set aside an award.

By a contract in writing dated October 11, 1918, Messrs. Fischel & Co., of London, hereinafter called "the sellers," sold to Messrs. Mann & Cook, of London, hereinafter called "the buyers," upon the terms of the printed rules of the General Produce Brokers' Association of London as indorsed thereon five tons of dry hen yolk at 4*s.* 5*d.* per lb. c.i.f.

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Shipment from certain Chinese ports August to October. Provisionally declared shipped by steamer *Iyo Maru* to London or Liverpool. The name of the vessel or vessels, marks, and full particulars to be declared to the buyers in writing with due despatch. Payment cash against documents in London. Any dispute arising out of the contract to be settled by arbitration in London in the usual manner, according to the rules of the General Produce Brokers' Association of London.

A printed indorsement (1) upon the contract stated that

(1) The indorsement on the contract so far as material was as follows: "Subject to the Rules and Conditions of Sale published by the General Produce Brokers' Association of London (as amended October, 1908, February, 1910, March, 1911, January, 1912 and 1914), 26th January, 1914.

. . . . . .

"XIII. In case of any question or dispute arising under a contract, the matter shall be referred to arbitration in accordance with the Rules and Regulations of the General Produce Brokers' Association of London.

. . . . . .

"Rule VII. of the Association referred to above.

"The Committee shall have power, when called upon, to settle matters in dispute between Members of the Association in connection with their business transactions.

"The following Regulations shall apply to all references to Arbitration under the Rules of the Association:—

"(*a*) Each disputant shall appoint in writing as arbitrator from the Register of Arbitrators a member thereof. No member of the Register shall act as arbitrator in a case where he is interested in the subject matter of the dispute, without the consent (in writing) of the parties to the dispute. If one disputant shall neglect to appoint an arbitrator within 48 hours after notice in writing received from the other disputant of the appointment of arbitrator made by him, the acting President shall appoint the other arbitrator from the Register of Arbitrators; a fee of 1*l.* 1*s.* in respect of such appointment, to be paid to the Association by the party to the dispute who shall apply for such appointment to be made.

"(*b*) Such arbitrators shall before entering on the arbitration appoint an umpire from the Register of Arbitrators, and in the event of the arbitrators being unable to agree upon an award they shall refer the dispute to the umpire. If the arbitrators shall neglect to appoint an umpire within seven days from their appointment, the acting President, at the request of either arbitrator, shall appoint an umpire from the Register of Arbitrators. The arbitrators and umpire shall have power to obtain, call for, receive, and act upon any such oral or documentary evidence or information (whether the same be strictly

the contract was subject to the rules and condition of sale published by the General Produce Brokers' Association of London as finally amended on January 26, 1914. The indorsement then set forth the conditions of sale of the association, one of which was that in case of any question or dispute arising under a contract, the matter should be referred to arbitration in accordance with the rules and regulations of the association. The indorsement also set out Rule VII. of the rules of the association, which contained the regulations applicable to all references to arbitration under the rules, these regulations providing for the appointment of arbitrators and an umpire and for an appeal from them to the committee of the association or to a council of appeal, and specifying the procedure to be followed at each stage.

On January 27, 1919, the sellers tendered the shipping documents to the buyers who, alleging that the provisions of the contract had not been complied with and that the documents were not in order, refused to accept the documents or to pay the price of the goods.

The parties then decided to go to arbitration. They respectively nominated two members of the association to act as their arbitrators; but the latter on being informed that the buyers required a case to be stated for the Court both declined to act, and the parties thereupon appointed other members to be their arbitrators, who at the time of their

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admissible as evidence or not), and to conduct the arbitration in such manner in all respects as they or he may think fit. The arbitrators and umpire shall proceed with the arbitration in the absence of the parties unless either of the parties shall have given written notice to his arbitrator at the time of his appointment of his desire to be present and/or to adduce evidence. Any party so giving notice shall be entitled at the same time to nominate a commercial man in London to represent him for all the purposes of the arbitration.

"(*c*) The award of such arbitrators or umpire (as the case may be) shall be final and binding on the parties unless within three clear days after the receipt of the award an appeal with a fee . . . . be lodged by either disputant with the Secretary of the Association. . . . ."

Provision was then made for an appeal to the committee of the association or to a council of appeal.

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appointment were also informed that the buyers required a case to be stated.

The buyers submitted to their arbitrator a written statement of the questions of law on which they desired a case to be stated—namely, whether the declaration of a certain vessel on January 7, 1919, had been made with due despatch; whether, a firm declaration of another vessel having been previously made on January 4, 1919, and afterwards withdrawn, any other declaration could be made at that late date; whether, assuming the declaration of January 7 to have been in time, the documents presented were in accordance with that declaration as showing a shipment on the vessel then declared; and whether the alleged bill of lading was a bill of lading or a mere receipt for goods.

The arbitrators not having appointed an umpire, the acting president of the association appointed an umpire.

On March 7, 1919, the arbitrators intimated in writing that they were unable to agree, and that they referred the matter to the umpire.

On March 12 a meeting of the arbitrators and umpire was held at which the arbitration was adjourned to March 21. On March 13 the umpire wrote to the buyers informing them of the time and place of the adjourned meeting in case they desired to be present, and stating that if they were not present he would give his award on the evidence already before him. On March 17 the umpire, on being asked by the buyers' arbitrator to state a case, intimated that he would not do so, and that if the point were pressed he would withdraw. On the same date the buyers' solicitors wrote to the umpire stating that they understood that he had so intimated, that the buyers did not withdraw from their request to have a case stated, and that if he declined to state a case and intended to act further in the matter, it would be necessary for them to apply to the Court for an order that he should make his award in the form of a special case, and asking whether he was willing to state a case. On March 18 the umpire replied (inter alia) that at the request of the buyers' arbitrator the hearing was adjourned until March 21, that on that date

he intended proceeding with the arbitration whether the parties were present or not in accordance with the rules of the said association, and that for their information he enclosed one of the association's forms giving the conditions laid down for arbitration. On March 19 the solicitors again wrote to the umpire asking for a definite answer to their question whether he was willing to state a case; and stating that at the adjourned meeting their clients desired to be represented by solicitors or counsel, and requesting that if the umpire refused to allow this he would let them know at once. On March 20 the umpire replied that he intended proceeding with the arbitration next day in accordance with the rules of the association, that it was not customary to allow either party to be represented by counsel at arbitrations under these rules, and he did not intend making any exception in the present instance.

On March 21 the adjourned meeting took place, and the umpire with the concurrence of the arbitrators then made his award, which was as follows: "I award that buyers must take up documents immediately paying for same, together with interest at 5 per cent. per annum from February 15, 1919, to date of payment. We (sic) further award that the fees for the award, viz., 16*l.* 16*s.*, be paid by the buyer." On the same date the umpire wrote to the buyers stating that the award was ready and would be given up on payment of these fees.

On March 22 the buyers' solicitors on their behalf took out a summons against the umpire to set aside the submission, but that summons was not proceeded with.

On March 24 the umpire wrote to the buyers that owing to the trouble he was being put to by legal proceedings he had raised the fees for the arbitration to 52*l.* 10*s.* (50 guineas).

The buyers gave notice of motion dated April 10, 1919, (1.) for an order that the award of the umpire be set aside on the ground of his misconduct in the arbitration (*a*) in failing upon the request of the buyers to state a case for the Court upon questions of law arising therein, and in proceeding with the arbitration and making the award in

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spite of that request and with the knowledge that the buyers were about to apply for an order that the umpire should state a case, (*b*) in refusing to hear the buyers on the arbitration by their solicitors or counsel; (2.) for an order to revoke the submission to the umpire upon the grounds set out above and on the ground that by reason of his having been requested to state a case he demanded from the buyers payment of arbitration fees of 52*l.* 10*s.*, although he had already made his award with the fees stated therein at 16*l.* 16*s.*; and (3.) alternatively, for an order that the umpire should state a case for the opinion of the Court upon the questions raised.

On behalf of the buyers affidavits were read verifying the facts above stated.

On behalf of the sellers an affidavit was read of Mr. A. B. Gow, a member of their firm, in which he stated that the sellers opposed the motion on the grounds that in arbitrations under the rules of the association the practice of stating a case for the opinion of the Court or of stating an award in the form of a special case was excluded by the terms of the contract; that that practice was also excluded by the custom of the association and of the trade, the deponent asserting that in his experience of the produce brokers' trade and as a member of the association of over twenty years' standing he knew of no case in which in an arbitration under the rules and before any appeal to the appeal committee a case had been stated for the opinion of the Court or an award stated in the form of a special case; that any application of that kind before an appeal to the appeal committee was premature; and that the questions of law raised by the buyers were not raised bona fide but merely for the purpose of delay and to prevent the procedure as to appeal provided by the rules from being followed.

In answer to the last-mentioned affidavit, a joint affidavit of a member of the buyers' firm and of their market manager stated that there was no such custom in the trade as that alleged; and denied that the application for a case to be stated was not made bona fide.

Stuart J. Bevan K.C. (*T. S. Wilding* with him) for the buyers, the applicants.

The umpire was guilty of misconduct in refusing at the request of the buyers to state a case for the opinion of the Court, or to postpone the making of his award until the buyers could apply to the Court for an order requiring him to state a case.

The contract between the parties no doubt contains a stipulation that disputes arising under the contract shall be referred to arbitration according to the rules of the General Produce Brokers' Association of London, Rule VII. of which provides for the settlement of disputes of that kind by a tribunal of arbitration assuming the successive forms of arbitrators, an umpire, and a committee of appeal, and contains a complete code of procedure for the tribunal in each of these forms.

The contract in so stipulating did not, however, on its true construction purport to exclude the jurisdiction of the Court to make an order on reasonable grounds directing the arbitration tribunal at any stage of the proceedings before it to state a case for the Court or to make its award in the form of a special case. The evidence does not establish any custom of the trade purporting in the case of contracts of this kind to exclude the jurisdiction of the Court to make an order directing the tribunal to state a case. If the contract or a custom did purport to exclude the jurisdiction of the Court to make such an order, it would to that extent be void as being opposed to the policy of the law. Moreover, the contract in so stipulating did not prevent the Court from having full discretion to direct the arbitration tribunal on reasonable grounds to state a case at any stage of the proceedings before it in any of its successive forms. The contract only meant to provide that the procedure of Rule VII. should be followed subject to the jurisdiction and discretion of the Court to require a case to be stated at any time on reasonable grounds. In the present case there were reasonable grounds for requiring a case to be stated, inasmuch as questions of law of a substantial character were raised by the buyers in good faith, and therefore if the Court had been applied to

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it would undoubtedly have ordered a case to be stated. The Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 19, provides that an arbitrator or umpire shall if so directed by the Court state a special case for the Court.

In view of these considerations, the umpire in the present case ought at the request of the buyers to have stated a case or to have delayed making his award until they could apply to the Court for an order directing a special case, and in refusing to comply with that request he was guilty of misconduct: *In re Palmer & Co. and Hosken & Co.* (1)

The umpire was also guilty of misconduct in refusing to allow the buyers to be represented by solicitors or counsel, and in raising his fee after having made his award in order to penalize the buyers for having taken legal proceedings which they had a right to take.

Because of the umpire's misconduct in each of these instances the matter ought not to be remitted to him under s. 10 of the Act of 1889, but his award should be set aside under s. 11.

Raeburn K.C. (*L. F. C. Darby* with him) for the sellers, respondents.

The sellers do not deny that the Court has jurisdiction to require the arbitration tribunal at any stage of the proceedings before it in any of its successive forms to state a case for the opinion of the Court or to make its award in the form of a special case.

The sellers submit, however, that the Court in its discretion will not, in the absence of some special reason for doing so, require the arbitration tribunal to state a case until all the successive stages of its own procedure have been passed through. There was here no special reason why the Court in its discretion should have required the tribunal to state a case. It was not necessary that the buyers should obtain the opinion of the Court on the points of law which they desired to raise. There was no substance in these points of law, and the buyers have suffered no substantial injustice because a case was not stated upon them. Even where there may have been technical misconduct on the part of a commercial arbitrator or umpire

(1) [1898] 1 Q. B. 131.

the Court will not as a rule interfere with his decision if no injury in the matter of substance has been done by the form in which he has expressed it: per Scrutton L.J. in *In re Olympia Oil and Cake Co.* v. *MacAndrew, Moreland & Co.* (1) The sellers do not now contend that these points of law were not raised in good faith. An application to the Court for an order for a special case was not the only remedy of the buyers; if they were aggrieved by the award of the umpire it would have been open to them to lodge an appeal against it to the committee of appeal under Rule VII (*c*).

If the Court would not have ordered the arbitration tribunal to state a case until all the stages of its procedure had been completed, the request of the buyers to the umpire while the matter was still before him to state a case or to delay his award until they could apply to the Court for a case was clearly premature. The proper course for the buyers was to have appealed to the committee of appeal. The course which the buyers desired to take would tend to an unnecessary multiplicity of proceedings, inasmuch as there might be several applications to the Court for a special case during the progress of the arbitration and finally an award stated in the form of a special case.

If the buyers could not properly require the arbitration tribunal to state a case, the umpire in refusing at their request to state a case or to delay his award until they could apply to the Court for an order for a special case was not guilty of any misconduct.

If the umpire was guilty of misconduct in refusing to state a case, or in refusing to allow the buyers to appear before him by solicitors or counsel, or in increasing his fee after having made his award, it was misconduct of a merely technical character.

That being so the Court ought not to interfere with the award of the umpire, or if it does it should remit it to him under s. 10 of the Act of 1889, and should not set it aside under s. 11 of that Act.

AVORY J. This is an application for an order that the award made in this arbitration by the umpire should be set

(1) [1918] 2 K. B. 771, 778.

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aside on the ground of the misconduct of the umpire in failing at the request of the applicants, the buyers, to state a case for the opinion of the Court on questions of law arising therein, and in proceeding with the arbitration and making the award in spite of that request and with the knowledge that the respondents were about to apply for an order that the umpire should state a case.

I entertain no doubt that the questions of law which the buyers desire to raise in this arbitration upon the merits constitute a fit subject for a special case, and therefore that it cannot fairly be said that the application which the buyers were going to make to the Court for an order directing the umpire to make his award in the form of a special case was a frivolous application. If a case had been stated, it may be that the sellers would have succeeded upon the argument of these questions of law upon the merits. This Court however is not called upon to express any opinion upon the merits.

In this case it appears that the umpire, notwithstanding that he knew that the buyers desired to make him state a case, or to delay his award until they could make an application to the Court for an order directing him to state his award in the form of a special case, made his award not in that form, thus depriving the buyers of the opportunity of making that application and the Court of the opportunity of hearing and deciding it, and the question is whether that action of the umpire amounted to legal misconduct. It has been settled beyond doubt by *In re Palmer & Co. and Hosken & Co.* (1), which was cited on behalf of the buyers, and by other cases, that where a party to an arbitration requests an arbitrator or umpire on reasonable grounds either to state a special case for the opinion of the Court or to delay his award until the party can apply to the Court for an order directing a case to be stated, a refusal of the request by the arbitrator or umpire amounts prima facie to legal misconduct on his part; and legal misconduct of that kind on his part is a ground upon which the Court may set aside his award. In the present instance the buyers'

(1) [1898] 1 Q. B. 131.

request to the umpire to state a case and their intimation to him that if he refused they would apply to the Court for an order directing him to do so were reasonable in the circumstances, and if the application had been made to the Court it would not only have had jurisdiction but also full discretion to grant it. I therefore think that the umpire in refusing to state a case or to allow the buyers to apply for one was prima facie guilty of misconduct, for which his award may be set aside.

It has been suggested on behalf of the sellers that the Court instead of setting aside the award of the umpire should remit it to the same umpire directing him to restate it in the form of a special case, and that this would probably be found the less expensive course to adopt. I cannot accede to that view. While I have no wish to characterize the conduct of this umpire in stronger terms than may be necessary, I feel bound to say that he appears to me to have adopted throughout an attitude of unmistakable opposition to any interference by a Court of law with the proceedings of the arbitration tribunal. I am satisfied that his conduct has all along been actuated by a settled though no doubt perfectly honest conviction that a Court of law ought not to be allowed to interfere at all with the exercise of his powers as umpire. Having regard to that attitude of his, I can foresee that if the matter were again to go before him in order that he might state his award in the form of a special case on the points of law which it is desired to raise, very considerable trouble would in all probability ensue to the parties.

Upon the whole, therefore, I have come to the conclusion that the proper order to make is that this award should be set aside.

SALTER J. I entirely agree. In this case it is admitted on behalf of the sellers that there has been misconduct on the part of the umpire in several respects, and I am constrained to say that I think that it was misconduct which was more than merely technical.

As regards the action of the umpire in refusing to state

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a case and in making his award otherwise than in the form of a special case, it is admitted further that the jurisdiction of the Court to require an arbitration tribunal to state a special case or to make an award in the form of a special case at any stage of the proceedings, and even after it has made an award otherwise than in that form, is in no way ousted by the rules of the association under which the award in question was made. It is, therefore, a matter for the discretion of the Court either to require the tribunal to state a case or not, or where, as here, the umpire has made an award which is not in the form of a special case, either to leave the award standing, or to remit it to the umpire, or to set it aside.

It is contended on behalf of the buyers that as the umpire disregarded their request that he should make his award in the form of a special case, or should delay making it until the buyers could apply for an order requiring him to do so, and made his award otherwise than in that form, the Court in its discretion should set aside the award.

It is argued on behalf of the sellers that the Court in its discretion ought not to interfere with the award of the umpire, first, because the application of the buyers that the award should be made in the form of a special case was premature, inasmuch as all the stages of procedure before the arbitration tribunal, as constituted under the rules of the association, which in this connection one may call the Court of first instance, had not been passed through. I cannot agree. When the parties to a contract insert in it an arbitration clause, they elect a tribunal which has its obvious advantages and its equally obvious disadvantages. Its advantages consist in the rapidity of its procedure and its familiarity with the business to which the contract relates; and one of its chief disadvantages consists in its inability to decide the questions of law which are bound to arise before it with the same precision with which they can be decided by a Court of law. In view of that disadvantage I think it is of the utmost importance that the right given by law to the parties to an arbitration, and not only to the parties but to the arbitration tribunal itself to have the assistance of the opinion of the

Court upon any question of law at any stage of the proceedings should be fully enforced; and it seems to me that the sooner points of law which are raised in good faith are rightly decided, the sooner is the correct ultimate decision of the dispute likely to be arrived at.

It is argued further on behalf of the sellers that there is no substance in the points of law upon which the buyers requested the umpire to state a case. I certainly am not satisfied that those points of law regarded as a group are either unfounded or frivolous. The umpire, if he has considered and decided them at all, has decided them against the buyers. He may have been right in so deciding them, but in any case the buyers are entitled not only to his opinion upon these points, but also to the opinion of the Court upon them. It seems to me that this is certainly not a case of the class in which, to quote the words of Scrutton L.J. in the passage which has been cited from his judgment in *In re Olympia Oil and Cake Co. and MacAndrew, Moreland & Co.* (1), "No injury in the matter of substance has been done by the form in which those commercial arbitrators have expressed their decisions."

The sellers also suggest that if the award is not allowed to stand it should not be set aside but remitted to the umpire. As to that, s. 10 of the Arbitration Act, 1889, gives the Court a general power at any stage to remit the matters referred to the reconsideration of the arbitrators or umpire, but s. 11, which deals with the case where an arbitrator or umpire has misconducted himself, provides that the Court may set aside the award. On the ground that the umpire has been guilty of misconduct, and I must add on the further ground that his conduct throughout has been such as to make it undesirable that the case should go back to him, I agree that the award should be set aside.

Application granted.
Award set aside.

Solicitors for applicants: *William A. Crump & Son.*
Solicitors for respondents: *Parker, Garrett & Co.*

(1) [1918] 2 K. B. 771, 778.

J. R.

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April 10, 11.

COMMISSIONERS OF INLAND REVENUE, APPELLANTS *v.* WARNES AND COMPANY, LIMITED, RESPONDENTS.

Revenue—Income Tax—Excess Profits Duty—Deductions—Penalty—"Loss connected with or arising out of" Trade or Business—Income Tax Act, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *Sched.* (*D*), *Case.* 1, *Rule.* 3.

The respondents, who carried on the business of oil exporters, were sued for a penalty on an information exhibited by the Attorney-General under the Customs Consolidation Act, 1876, s. 139, as extended by the Customs (War Powers) Act, 1915, s. 5, sub-s. 1, for the breach of orders and proclamations relating to the requirements of the Board of Customs and Excise with respect to a consignment of oil shipped by them to Norway. The action was settled in court by consent on an agreement by the respondents to pay a mitigated penalty of 2000*l.*, that sum to cover the costs of the Crown, all imputations on the moral culpability of the respondents being withdrawn, and it being made clear to the public that the respondents had not been taking part by connivance or consent in trading with the enemy, but had only been guilty of carelessness. Judgment in favour of the Crown was entered against the respondents in the mitigated penalty of 2000*l.* to cover the costs of the Crown:—

Held, that the penalty was not a "loss connected with or arising out of" the trade or business within the meaning of s. 100, Sched. (D), Case 1, Rule 3, of the Income Tax Act, 1842, and was therefore not a proper deduction in arriving at the profits of the respondents' trade or business for the purpose of excess profits duty (which is calculated upon the same principle as income tax, subject to certain modifications contained in s. 49, sub-s. 1, of the Finance (No. 2) Act, 1915, not material to the present case). To be within the section the loss must be something within commercial contemplation and in the nature of a commercial loss.

CASE stated under the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), s. 59, and the Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 45, sub.-s. 5, by the commissioners for the general purposes of the Income Tax Acts for the division of Hull.

At a meeting of the commissioners on May 14, 1917, the respondents, Messrs. E. C. Warnes & Co., Ld., appealed against two several assessments to excess profits duty amounting to 973*l.* for the accounting period ending June 30. 1915, and to 592*l.* 4*s.* for the accounting period ending June 30, 1916, made on them by the Commissioners of Inland Revenue in respect

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of their profits from the business of oil merchants carried on by them at Hull and elsewhere.

The ground of appeal was that in arriving at the profits of the business for the purpose of the assessments a penalty of 2,000*l.*, imposed upon the respondents in *Attorney-General* v. *E. C. Warnes & Co., Ld.*, heard in the King's Bench Division on April 10, 1916, and costs amounting to 560*l.* 18*s.* 10*d.* incurred by them in relation thereto, should be deducted under Rule 3, Case 1, Sched. (D) of the Income Tax Act, 1842, s. 100, on the ground that the penalty and costs were a loss arising out of and incidental to the trade of the respondents and, therefore, deductible.

The respondents, who carried on the business of oil exporters, were sued for a penalty in the King's Bench Division on an information exhibited by the Attorney-General under the provisions of the Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), s. 139, as extended by the Customs (War Powers) Act, 1915, s. 5, sub.-s. 1 (1), for an offence alleged against them in breach of certain orders and proclamations relating to the requirements of the Board of Customs and Excise with respect to a consignment of oil shipped by the respondents to Norway. The action was settled in court by consent on the agreement by the respondents to pay a mitigated penalty of 2000*l.*, that sum to cover the costs of the Crown and on all imputations as to the respondents' moral culpability being withdrawn, and on it being made clear to the public that there was no

(1) Customs (War Powers) Act, 1915 (5 Geo. 5, c. 31), s. 5, sub-s. 1: "Where in pursuance of any order made by the Commissioners of Customs and Excise under section 139 of the Customs Consolidation Act, 1876, a person in the course of making entry before shipment makes a declaration as to the ultimate destination of any goods then . . . . the exporter shall, if so required by the Commissioners of Customs and Excise, produce evidence to their satisfaction that those goods have not reached a destination in any territory which, under any Proclamation issued by His Majesty dealing with trading with the enemy for the time being in force, is or is treated as enemy country, and if he fails to do so he shall be liable to a penalty of treble the value of the goods or 100*l.* at the election of the Commissioners, unless he proves that they reached such destination without his consent or connivance, and that he took all reasonable steps to secure that the ultimate destination of the goods should be the destination mentioned in the declaration."

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intention on the part of the respondents from the beginning to the end of the transaction to trade with the enemy, nor had they by connivance or consent been taking part in trading with the enemy, but had only been culpable of carelessness. Judgment in favour of the Crown was accordingly entered against the respondents in the mitigated penalty of 2000*l.* to cover the costs of the Crown. The penalty of 2000*l.* was in due course paid to the Crown.

In defending the proceedings, the respondents incurred legal costs amounting to 560*l.* 18*s.* 10*d.* The assessments appealed against were based on the profits made by the respondents without deduction of the sums of 2000*l.* and 560*l.* 18*s.* 10*d.* The transaction in respect of which this penalty was imposed took place in the first-mentioned accounting period, but the penalty and costs were debited as an expense in the respondent's accounts in arriving at the profits of the second accounting period when the action had been heard and determined.

The surveyor of taxes, on behalf of the Crown, contended that :—

(*a*) This was not a loss connected with or arising out of the trade or business of the respondents within the meaning of the 3rd Rule, Case 1, Sched. (D) of the Income Tax Act, 1842, s. 100.

(*b*) The amounts paid as penalty and costs could not be regarded as necessary expenses of carrying on the trade or business of the respondents, and were not proper deductions in arriving at the profits of the respondents' trade or business for the purpose of excess profits duty.

He cited the Customs (War Powers) Act, 1915, s. 5, sub.-s. 1, and *Strong & Co.* v. *Woodifield* (1) in support of his case.

On behalf of the respondents, it was contended that both the penalty and costs should be allowed and deducted in arriving at the balance of profits and gains as defined by Rule 3, Case 1, Sched. (D) of the Income Tax Act, 1842, s. 100, on the ground that the penalty and costs were a loss arising out of and incidental to the trade of the respondents and were,

(1) [1906] A. C. 448.

therefore, legally deductible. It was pointed out that the Act introducing excess profits duty was not in operation at any material time during the transaction in question, and that the respondents could not properly be said to have taken any business risks at the substantial expense of the Crown.

It was submitted on behalf of the respondents that this penalty and the costs consequent thereupon were solely connected with and arose out of the trade carried on by them, and were therefore deductible in the same manner that bad debts are deductible in ascertaining what is the balance of the profits and gains for the accounting periods in question, and that it was only arising out of and because of the trading that the penalty and costs were incurred : *Gresham Life Assurance Society* v. *Styles* (1) ; *Strong & Co.* v. *Woodifield.* (2)

Further, Rule 3, Case 1, Sched. (D) does not affirmatively state what losses may be deducted. It merely says what shall not be deducted, and it was contended that as this was a deduction not forbidden by Rule 3, it was a loss commercially arising out of the trading of the company and, therefore, deductible : *Vallambrosa Rubber Co.* v. *Inland Revenue Commissioners* (3) ; *Partridge* v. *Mallandaine* (4) ; *Reid's Brewery Co.* v. *Male* (5) ; *Royal Insurance Co.* v. *Watson* (6) ; *Smith* v. *Lion Brewery Co.* (7) ; *Usher's Wiltshire Brewery* v. *Bruce.* (8)

These cases are all illustrations of different classes of deductions allowable before the balance of profits and gains can be arrived at.

It was further contended on behalf of the respondents that the profits must be taken in their commercial sense, and that this was a loss which an ordinary prudent commercial man would and could only write off against the profits of the business. If so, it was clearly deductible : *Strong & Co.* v. *Woodifield.* (2)

The general commissioners determined that both the fine

(1) [1892] A. C. 309, 315, 316, 324.
(2) [1906] A. C. 448.
(3) (1910) 47 Sc. L. R. 488 ; 5 Tax Cas. 529.
(4) (1888) 18 Q. B. D. 276.
(5) [1891] 2 Q. B. 1.
(6) [1897] A. C. 1, 9.
(7) [1911] A. C. 150.
(8) [1915] A. C. 433.

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and costs were legally deductible in arriving at the balance of profits and gains as defined by Rule 3, Case 1, Sched. (D) of the Income Tax Act, 1842, s. 100, and allowed the amount as proper to the accounting period in which it was paid—i.e., for the year ending June 30, 1916. The excess profits, as a result of the deduction for that period, having been reduced to "nil," they discharged the assessment for that period.

The surveyor of taxes appealed.

Sir Ernest Pollock S.-G. and *T. H. Parr* for the Crown. The contention on the part of the respondents involves the proposition that if merchants engage in trade which involves them in a serious penal liability, they can, under s. 100, Sched. (D), Case 1, Rule 3, deduct the costs and penalty they have paid as being part of the outlay which it was necessary for them to expend for the purpose of earning the income. Excess profits duty is calculated upon the same principle as income tax, subject to certain modifications contained in s. 40, sub.-s. 1, of the Finance (No. 2) Act, 1915, which do not apply to the present case. In *Strong & Co.* v. *Woodifield* (1) Collins M.R. said: "It seems to me, looking at these rules, that the root of the matter is that all expenses necessary for the purpose of earning the profits may properly be deducted, but that expenses to come out of the profits after they are earned cannot be deducted, unless there can be found some express provision of the Act authorizing the deduction." [They were stopped.]

Hon. W. Finlay K.C. and *Bremner* for the respondents. The commissioners were right. The penalty and costs were the direct result of the carrying out by the respondents of a business contract, under which they consigned the oil to Norway.

Income tax is charged upon the balance of the profits and gains, subject to any specific statutory prohibition, on ordinary commercial principles. The effect of the 2000*l.* fine was that there was in fact no profit on the year's trading available for the shareholders. Income tax is the Crown's share of the

(1) [1905] 2 K. B. 350, 356.

profits. On behalf of the Crown it is said, in effect, "If you had not incurred this fine there would have been a profit."

The answer is: "If we had not incurred this fine we should not have made the profit." The tax is levied upon the balance, a loss being set against profits. If profits of this particular transaction are brought in on one side, on the other side the costs incurred in carrying it out must be brought in. The penalty was not incurred by the respondents in consequence of their having committed a criminal offence in the ordinary sense of the term. The respondents must, no doubt, be assumed to have partially failed to have taken all reasonable precautions, but it was due to carelessness, and that was a business risk which every exporter to Scandinavia took. In arriving at the tax an ordinary trading account must be taken with any exceptions specifically dealt with by the Act, and it must be ascertained whether on that trading account there is a profit. If an omnibus driver runs over some person under such circumstances as to be guilty of manslaughter, and the omnibus company have to pay damages, can it be doubted that that is a loss incurred in the course of carrying on the business, although it was an illegal act on the part of the omnibus driver? It could scarcely be doubted that in that case the company could deduct the amount they had to pay. The present case is upon the facts stronger in favour of the respondents. The authorities, as exemplified by *Gresham Life Assurance Society* v. *Styles* (1), *Strong* v. *Woodifield* (2) and *Partridge* v. *Mallandaine* (3) are strongly in their favour. Another illustration would be that of a bookmaker who incurred a fine for street betting. That would clearly be deductible as a loss incurred by him in carrying on his vocation. The question is, would an ordinary commercial man consider any particular expense as a loss or not? It is a question of fact in each case: *Sun Insurance Office* v. *Clark* (4); *Smith* v. *Incorporated Council of Law Reporting* (5); *Usher's Wiltshire*

(1) [1892] A. C. 315.
(2) [1906] A. C. 448.
(3) 18 Q. B. D. 276.
(4) [1912] A. C. 443.
(5) [1914] 3 K. B. 674.

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Brewery v. *Bruce*. (1) Those authorities show that the balance of profits and gains has to be arrived at in the same way as the balance distributable among the shareholders in a company is ascertained. Subject to any express prohibition the profits and gains are to be arrived at on ordinary commercial principles, and there was ample evidence upon which the commissioners could find as they did. In *Strong & Co.* v. *Woodifield* (2) there was not a trade risk. The risk was one which any person who keeps a house incurs. But in the present case the penalty was incurred by the respondents solely in their capacity of traders, and was connected as closely as possible with their trade. The respondents committed a merely technical breach of the law.

Sir Ernest Pollock S.-G. in reply. The question is what is a loss connected with or arising out of a trade or business within the meaning of s. 100. Sched. (D), Case 1, Rule 3, of the Income Tax Act, 1842. The contention on behalf of the respondents involves the proposition that because they failed to carry on their business within the restrictions imposed upon them and they suffered a penalty, that was a loss connected with, and arising out of the trade. They were not entitled to send oil to Norway except within the limits imposed by the restriction. In fact they did so, and failed to observe the restriction imposed. The only trade which they had a right to carry on was trade within the limits imposed by municipal law. The respondents claim to carry on their trade as they please. If a person were to carry on his trade in defiance of the law against adulteration and in consequence incurred a penalty, it could not be held that he would be entitled to attribute the fines he had to pay as losses arising out of his business. The business for this purpose must be taken to be a legitimate business. The Customs (War Powers) Act, 1915, restrained persons from doing business in a particular way. If they took a particular course then they were to be armed with particular information which they were able to secure. If they failed then they were liable to the penalty, and if they were determined to carry on a business of this nature they

(1) [1915] A. C. 433. (2) [1906] A. C. 448.

should have taken the proper precaution to see that they were well armed before the goods were shipped. They failed to take the care which was necessary in order to keep their business and their trade within the limits and restrictions imposed by the municipal law, and they cannot deduct the fine as a loss incurred in that business which they never ought to have carried on in that manner, in breach of the restrictions imposed upon them by municipal law.

The statute imposes a very heavy penalty to prevent the particular business being done unless due and adequate safeguards have been made. It is not therefore an ordinary trade which is being carried on. The statute imposes a prohibition against the trade being carried on except under the safeguards it provides. In order to be a loss within the meaning of Sched. (D), Case 1, Rule 3, it must be a loss which legitimately or ordinarily arises out of or is connected with trade, and it is impossible to say that the penalty incurred by the respondents falls within that description.

Cur. adv. vult.

April 11. ROWLATT J. This is an appeal from the commissioners for the general purposes of the Income Tax Acts for the Division of Hull, who allowed a deduction of a penalty of 2000*l.*, and costs which had been incurred and paid by the respondents in certain proceedings by way of information instituted against them by the Attorney-General. The respondents carried on the business of exporting oil to Norway among other places; and in connection with the export of a certain cargo, it was alleged that they incurred penalties, under s. 5, sub.-s. 1, of the Customs (War Powers) Act, 1915. They were sued for a very large sum, but, by consent, judgment was taken for a mitigated penalty of 2000*l.*, and they were ordered to pay their own costs. Sect. 5, sub-s. 1, of the Act of 1915 is of very great stringency; but, of course, the liability it creates can only be regarded as a liability of a penal character. Under those circumstances it was argued that this sum was a "loss . . . . connected with or arising out of" their trade, within the meaning of s. 100, Sched. (D), Case 1, Rule 3, of

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Rowlatt J.

the Income Tax Act, 1842. Now, undoubtedly this detriment, if I may use the vaguest word, is a "loss" in the sense that the respondents have had to pay 2000*l.*, and therefore do not possess the 2000*l.* which they otherwise would have had. It is also "connected with or arising out of such trade," because they committed the offence—or what must be regarded as the offence—in carrying out their trade. But the question is whether, within the meaning of the rule, it is a loss connected with or arising out of their trade. I may shelter myself behind the authority of Lord Loreburn L.C., who in his judgment in the House of Lords, in *Strong & Co.* v. *Woodifield* (1), said that it is impossible to frame any formula which shall describe what is a loss connected with or arising out of a trade. That statement I adopt, and I am not sure that I gain very much by examining a number of analogies; but it seems to me that a penal liability of this kind cannot be regarded as a loss connected with or arising out of a trade. I think that a loss connected with or arising out of a trade must, at any rate, amount to something in the nature of a loss which is contemplable and in the nature of a commercial loss. I do not intend that to be an exhaustive definition, but I do not think it is possible to say that when a fine—which is what the penalty in the present case amounted to—has been inflicted upon a trading body, it can be said that that is a "loss connected with or arising out of" the trade within the meaning of this rule. I have already expressed the view that it is impossible to define what is such a "loss," but I have a clear view that this sum is not, and I can say no more than that. The appeal must therefore be allowed with costs.

Appeal allowed.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for respondents: *Waltons & Co., for A. M. Jackson & Co., Hull.*

(1) [1906] A. C. 448, 452.

J. E. A.

HARRISON *v.* WALKER.

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May 5, 6.

[1918 H. 1382.]

Contract—Joint Occupation of Premises—Reasonable Conduct of Parties—Isolated Quarrel—Conduct or Threat rendering joint Residence unsafe or practically impossible—Breach of Contract.

The plaintiff and defendant jointly purchased a bungalow with certain appurtenances and accessories thereto, and the plaintiff alleged by his statement of claim that "the plaintiff and the defendant purchased the bungalow . . . . for the purpose of residing together therein, and it was an implied term of" a "verbal arrangement then made in that behalf that each party, while in occupation of the . . . . bungalow, should so act as not to prejudice or prevent the ordinary occupation thereof by the other party, and/or that he should act reasonably having regard to and under the circumstances of the mutual occupation," but that the defendant "by his threats, violence, and quarrelsome conduct, and in breach of the agreement, ... made it impossible to the plaintiff to continue in occupation of the . . . . bungalow, and he was consequently obliged to quit the same, ... and was put to inconvenience and expense in residing elsewhere," and the plaintiff claimed damages for breach of contract, and a declaration that he was entitled to an undivided half share in the bungalow and its appurtenances:—

Held, that there was a legal duty upon the parties to do all that was reasonably necessary to enable the contract to be carried out, but that principle of law must be applied with care, and due regard must be had to the particular circumstances of each case. In order to establish the cause of action relied upon in the statement of claim there must be proof either of physical dispossession, or of conduct or a threat of conduct of such a character as to render it physically unsafe or practically impossible for the other party to continue in residence with the person who has made the threat or been guilty of the conduct; and as in the present case there had been no repudiation by the defendant of his contractual obligation and all that appeared to have happened was that the plaintiff left the bungalow because it was unpleasant for him to remain, his claim for damages under the statement of claim must fail:—

Held, further, that before the Court made the declaration asked for, it ought to be satisfied that there had been a real dispute between the parties as to the right of the plaintiff, and as there was no ground for suggesting that the defendant ever disputed that the plaintiff was fully entitled to a half share in the bungalow and its appurtenances, the claim for the declaration also failed.

ACTION tried before McCardie J. without a jury.

The action was brought by the plaintiff, Harrison, to recover (inter alia) damages for breach of contract, and for a declaration

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that the plaintiff was entitled to an undivided half share of a bungalow known as "The Swamp," Trowlock Island, Hampton Wick, and the appurtenances thereof.

In June, 1918, the plaintiff and the defendant jointly purchased the bungalow, together with certain appurtenances and accessories thereto, for the sum of 146*l.* 8*s.* 8*d.*, half of that sum being advanced by the plaintiff and half by the defendant.

By para. 3 of his statement of claim, the plaintiff alleged that "the plaintiff and the defendant purchased the said bungalow as aforesaid for the purpose of residing together therein, and it was an implied term of the verbal arrangement then made in that behalf that each party, while in occupation of the said bungalow, should so act as not to prejudice or prevent the ordinary occupation thereof by the other party, and/or that he should act reasonably having regard to and under the circumstances of the mutual occupation." Para. 4 alleged that "from the time of purchasing the said bungalow the plaintiff and defendant jointly occupied the same; but the defendant, by his threats, violence, and quarrelsome conduct, and in breach of the agreement referred to in the last preceding paragraph, made it impossible for the plaintiff to continue in occupation of the said bungalow, and he was consequently obliged to quit the same on July 17, 1918, and was put to inconvenience and expense in residing elsewhere." By his defence the defendant traversed each and all the allegations in paras. 3 and 4 of the statement of claim.

The following statement of the facts is taken from the judgment of the learned judge: "The plaintiff and defendant, down to the middle of the year 1918, were in close friendship. The friendship extended to business matters, as well as to private life. Both were concerned in a business called the Rotunda Aircraft Works, which was a partnership concern; both were connected officially with a company known as the Fairby Construction Co., Ld.; both were also connected with a company in the North of England known as John Dawson & Co., Ld. The closeness of their association in these matters led them to agree upon living together in

private life. Hence they lived in a flat at Hampstead; but while residing there they decided that they would seek relief from their business activities in the quiet of a life beside the river Thames; and accordingly they bought the bungalow; and, having purchased it, together with a number of appropriate fittings, they went, in the latter part or middle of the year 1918, to Trowlock Island, Hampton Wick. There they placed the bungalow (in fact a large tent) and carried those appurtenances which would give charm to their river life. All went well for some period, both in business and domestic life, between the two; but, unfortunately, disputes then arose with regard to business. I do not propose to review in detail those disputes. It will suffice to say that in the middle of July, 1918, a large degree of asperity existed between the parties. The defendant, who was a director of the Fairby Construction Co., Ld., dismissed the plaintiff, who was the secretary of that company, and indicated that there would be no further need for his services. Asperity also arose with regard to a proposal which was made between them with regard to the Grosvenor Motor and Garage Co., Ld. The plaintiff and defendant desired that a Major Allen should enter that concern, and bring capital with him to enable it to achieve success. Two at least of the difficulties between the parties arose with regard to Major Allen. The plaintiff asserts that it was the duty of the defendant to tell the whole financial truth to Major Allen with regard to the Grosvenor Motor and Garage Co., Ld., and the first difficulty which arose with regard to Major Allen was that the plaintiff asserted that the defendant did not tell the whole of the truth to that gentleman. The defendant asserts that he told all that was necessary; but the result was anger between the parties; and on July 13 the plaintiff wrote a letter to the defendant which would not ease the situation between them in any way. There was a further difficulty, which was in substance that the defendant asserted that the plaintiff was failing to bring to the benefit of the Fairby Construction Co., Ld., the whole business that it was entitled to receive from him. The episodes which led to the first claim of the plaintiff in the action in substance

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commenced with the asperities that I have referred to. The week-end, represented by Saturday and Sunday, July 13 and 14, 1918, was not spent by the plaintiff at the bungalow—he spent it elsewhere; but on the following Monday morning the parties met, and the bitterness between them grew. In spite however of that bitterness, the plaintiff went down to the bungalow on the Monday evening, and there apparently spent the whole of the night; but on Tuesday morning, July 16, there occurred those events which the plaintiff relies upon in order to establish the cause of action for which he seeks damages. The disputes between the parties were mentioned at breakfast, which was taken outside the bungalow, and thereupon the defendant became angry at certain accusations which had been made by the plaintiff, and also with respect to certain business which he thought might have been lost through the views of the plaintiff. The plaintiff threatened that he would write to Major Allen to complain that the defendant had not revealed the whole financial truth to that gentleman with regard to the Grosvenor Motor and Garage Co., Ld. It is admitted that the defendant said that he thought the plaintiff was seeking in some form or another to blackmail him, and that if the plaintiff did seek to intimidate him, he would thrash him and throw him into the river. The defendant admits quite frankly that he was very angry about that which the plaintiff had said and written to him. He admits that a fracas arose at breakfast, and that he clenched his fists and physically threatened the plaintiff; but he did not proceed to carry his physical threats into effect; and this was conceded by the plaintiff. At any rate it was a very unfortunate scene, and was followed by a dispute with regard to certain papers then belonging to the defendant, which the defendant obtained from the plaintiff either by seizing them at the table or from the hands of the plaintiff. The plaintiff went from the bungalow back to London on that Tuesday morning, and he states that life with the defendant within the tent thenceforward became impossible. He, however, returned on that Tuesday evening to the tent and spent the night there with the defendant."

J. B. Matthews K.C. and *E. F. Lever* for the plaintiff.

Bickmore (*Giveen* with him) for the defendant. There is no precedent to be found in support of paras. 3 and 4 of the statement of claim, but even if those paragraphs show a cause of action they are not supported by the facts. The plaintiff and defendant did not intend, when they undertook to share a common life, to make a bargain enforceable at law. The consideration for their mutual forbearance and action was friendship, and friendship alone. An agreement founded on friendship and mutual conventional convenience is not capable of giving rise to enforceable legal obligations. No doubt conventional, social and moral obligations of mutual forbearance and consideration for the tastes, feelings and habits of each other arose; but those matters cannot of themselves give rise to legal obligations enforceable by action. The result would be endless litigation covering a very wide field in social life.

Even if there was an agreement enforceable at law there was, upon the facts, no breach of it. There was no actual physical violence, no dispossession or ejectment. The defendant did not carry his threats into effect. There was no continuous course of conduct of the kind alleged in the statement of claim. There was a mere isolated explosion of anger on the part of the defendant, checked and controlled and not carried to extremities. If legal obligations exist they must be mutual, and the plaintiff by his conduct and acts was alone responsible for the rupture which occurred. He withdrew voluntarily, following his own inclination, and he is therefore not entitled to succeed.

Matthews K.C. in reply. It is true that mere social engagements—e.g., invitations to dine or to visit friends—do not give rise to legal obligations, for they are not "acts in the law"; but this principle has no application to cases in which property is acquired by the parties for the purpose of forming the basis of arrangements for employing it for their mutual enjoyment or advantage. That transaction is of necessity an "act in the law," giving rise to mutual rights and obligations. The acquisition of the bungalow and its

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accessories for the joint occupation of the plaintiff and the defendant involved the parties in reciprocal obligations binding each to so conduct himself towards the other as not to deprive the other of the advantages contemplated by both.

The threat of personal violence complained of by the plaintiff rendered it impossible for him to continue in joint occupation of the bungalow with the defendant, and therefore amounted to an actionable breach of the defendant's implied obligation not to do anything to deprive the plaintiff of the benefits impliedly stipulated for. Probably the plaintiff might, upon the facts, have maintained a claim in tort for ouster from the joint occupation of the bungalow, but however that might have been had the action been framed in tort, the defendant's conduct certainly amounted to a breach of his implied contract.

McCARDIE J., having stated the facts, continued: Upon those facts the learned and ingenious author of the statement of claim has framed a cause of action in paras. 3 and 4 which I am invited to establish.

It is not disputed that the plaintiff resided elsewhere from the period July 17 to the end of September, 1918, and that he thereby incurred expenses amounting to 19*l.* 5*s.* for other rooms.

The question is whether upon the facts as I have stated them a cause of action is established. The action is not based upon ouster in the ordinary sense. If the defendant had totally and physically expelled the plaintiff from the possession or occupation of the bungalow, I conceive that with regard to the bungalow, as with regard to the ordinary case of land, with joint tenants in possession, there would have been ouster. But the case made by the plaintiff does not rest upon that footing; nor do I think that it could, because there was not in fact any physical dispossession by the defendant of the plaintiff from the bungalow.

The case, therefore, rests upon a unique basis, which, so far as I am aware, has not been discussed in the courts. It rests upon an implied contract which it is asserted exists between the

parties, that neither will do that which, by diminishing the amenities of the joint residence, shall render it impossible as a practical matter for the other person to dwell therein. Now, the plaintiff would certainly be right in asserting as a proposition of law, that it is the duty of each party to a contract to do all that is reasonably necessary for the purpose of enabling that contract to be carried out. Nowhere is the matter put with greater clarity or force than by Lord Blackburn in *Mackay* v. *Dick* (1), where he said: "Where in a written contract it appears that both parties have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing." That statement was fully adopted by the Judicial Committee of the Privy Council in *Sprague* v. *Booth*. (2) I need take one further illustration only with regard to this doctrine—namely, *Terry* v. *Moss's Empires* (3), a more recent authority, where in connection with theatrical contracts the Court of Appeal indicated that it was the duty of each party to act reasonably in the carrying out of all matters which were essential for the proper performance of the obligation. The law cannot differ whether the contract is written or verbal. In each case the obligation must be the same—namely, that each party must do that which is reasonably necessary for carrying out the contract; but that principle must be applied with care, and must be always considered in connection with the particular circumstances of each case.

Now in the present case I am satisfied that there was, in fact, no repudiation of the contract by the defendant. There was an isolated quarrel in the bungalow. Never before the morning of Tuesday, July 16, 1918, had there been any quarrel between the parties at that place. Nor was there any quarrel when the plaintiff went back on the evening of that Tuesday. The threat which was made by the defendant sprang immediately from a statement of an annoying character made by the

(1) (1881) 6 App. Cas. 251, 263. (2) [1909] A. C. 576.
(3) (1915) 32 Times L. R. 92.

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plaintiff. It was an isolated quarrel; and there was nothing before that date which would indicate any quarrelsome conduct on the part of the defendant. It will be observed that although the defendant used strong language, and although he indicated a desire to project the plaintiff into the waters of the Thames, he did nothing more than that. He never said to the plaintiff: "You must not come to the bungalow again." He never denied in any way the right of the plaintiff to such enjoyment as he could gain, he being under the same tent with the defendant who had made these statements to him. It is not necessary for me to review the authorities with regard to repudiation. I had occasion so to do in *In re Rubel Bronze and Metal Co. and Vos* (1), where I indicated the decisions as they now stand upon the question of repudiation. Applying those authorities to the facts of this case, there was no repudiation by the defendant of his contractual obligation.

If there was no repudiation by the defendant of his contractual obligations, the case for the plaintiff must rest upon the proposition that any offensive observation, any undesirable conduct on the part of one of the parties which renders it unpleasant for the other party to remain in the joint and agreed-upon residence, would give rise to a cause of action. I need scarcely indicate the extraordinary stretch of contractual obligation that any such doctrine would cause. In my view, no action such as the present will lie, unless there be either physical dispossession, or conduct or a threat of conduct of such a character as to render it physically unsafe or practically impossible for a person to continue in residence with the person who has made the threat or been guilty of the conduct. In the present case there is no suggestion that the defendant repeated his threat, nor is there any suggestion that he ever indicated that he would inflict actual physical violence in the future upon the plaintiff; and my own view is, that all that happened was that by reason of the extremely unpleasant verbal passages which had taken place between the two, the plaintiff, as a sensitive individual, found it inconsistent with his domestic content to continue in the same

(1) [1918] 1 K. B. 315, 322.

abode as the defendant. I cannot hold that a mere quarrel, accompanied by the threat of physical violence, but unaccompanied by an intent to repeat acts or matters which would render residence impossible, amounts to a breach of any implied contract between the parties. My view is that the plaintiff left because of the extremely unpleasant position between the defendant and himself with regard to business matters. The result is that upon the facts of this case, the ingenious claim in paras. 3 and 4 of the statement of claim must fail.

I am invited however to make a declaration to the effect that the plaintiff is entitled to an undivided half share in the bungalow and the appurtenances thereof. Now, before the Court makes a declaration, it should be satisfied that there has been a real dispute between the parties as to the right of the person who claims the declaration. In this case I cannot see the slightest ground for suggesting that the defendant ever disputed that the plaintiff was fully entitled to a half share in the bungalow and the appurtenances thereof. I certainly cannot infer any intention whatever on the part of the defendant to dispossess the plaintiff in any way of his rights. My view is, that a declaration to the effect asked by the plaintiff is wholly unnecessary. The plaintiff's claim for damages in paras. 3 and 4 of his statement of claim fails, and also his claim for a declaration in respect of the bungalow, and as to those claims there must be judgment for the defendant.

Solicitors for plaintiff : *Blanckensee & Co.*
Solicitors for defendant : *W. Hubert Smith & Co.*

J. E. A.

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May 14.

GUARDIANS OF THE POOR OF THE LEWISHAM UNION *v.* GUARDIANS OF THE POOR OF THE WANDSWORTH UNION.

Poor Law—Pauper Lunatic—Expenses of Maintenance in Asylum—Wife of Soldier—Irremovability—Poor Removal Act, 1846 (9 & 10 *Vict. c.* 66), *s.* 1—*Poor Removal Act*, 1848 (11 & 12 *Vict. c.* 111), *s.* 1—*Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5) *s* 294.

By s. 1 of the Poor Removal Act, 1846, "no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for [one year] next before the application for the warrant: provided always, that the time during which such person . . . . shall be serving her Majesty as a soldier . . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned."

By the Poor Removal Act, 1848, "whenever any person should have a wife or children having no other settlement than his or her own, such wife and children . . . . should not be removable from any parish or place from which he or she would not be removable. . . . ."

By s. 294 of the Lunacy Act, 1890: "All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision of the Poor Removal Act, 1846, as amended by subsequent Acts, shall be paid by the guardians of the union wherein the lunatic has acquired such exemption. . . . ."

A man was born and lived with his parents in a parish in the W. Union, thereby acquiring a settlement in that union. In April, 1912, he went to reside in a parish in the L. Union where he lived till September 7, 1914, thereby becoming irremovable from that parish. On September 7, 1914, he enlisted in the Army and served as a soldier until August 25, 1918, when he was killed. On November 22, 1914, he married. His wife, after her marriage, went back to live with her parents in a parish in the W. Union, where she continued to reside till she became insane. On September 27, 1916, she was sent to an asylum as a pauper lunatic:—

Held, that the husband by virtue of s. 1 of the Poor Removal Act, 1846, retained his status of irremovability in the L. Union as long as he was serving as a soldier; that his wife by virtue of the Poor Removal Act, 1848, had the same status of irremovability in the L. Union as her husband had, and that when she became insane and was sent to an asylum the incidental expenses and the expense of her maintenance in the asylum were, under s. 294 of the Lunacy Act, 1890, payable by the Guardians of the L. Union, notwithstanding the fact that at the time of her removal to the asylum she was not resident in the parish from which her husband was irremovable.

CASE stated by a Court of quarter sessions for the County of London.

The Guardians of the Poor of the Lewisham Union in the County of London (hereinafter referred to as the Lewisham Guardians) appealed to quarter sessions against an order made on September 29, 1916, on the application of the Guardians of the Poor of Wandsworth Union (hereinafter referred to as the Wandsworth Guardians), by two justices for the said county whereby it was adjudged that a pauper lunatic, one Gertrude Annie Mungeam, was not, on September 26, 1916 (the date of a reception order directing the Superintendent of the Long Grove Asylum for the County of London at Epsom, to receive the said pauper lunatic as a patient into his asylum), nor at the time of the making of the said order, settled in the Wandsworth Union, but that her last legal status of irremovability was in the parish of Lewisham in the Lewisham Union, and it was ordered that the Lewisham Guardians should forthwith pay to the Wandsworth Guardians certain sums for the expenses of the maintenance of the said pauper lunatic in the said asylum incurred within twelve months previous to the date of the said order and certain other expenses, and also should pay to the superintendent of the asylum the reasonable expenses of the future maintenance of the said pauper lunatic in the asylum so long as she should remain confined in that asylum.

At the hearing on October 29, 1918, the following facts were admitted: Ernest George Mungeam was born on March 2, 1891, and lived with his parents up to April 12, 1912, within the Wandsworth Union, and thereby acquired a settlement in a parish in the Wandsworth Union. At the last-mentioned date Mungeam had attained the age of 21 years, and had not acquired a settlement in any other Union. He then went with his parents to live at Catford in the Lewisham Union where he lived until September 7, 1914, and thereby acquired a status of irremovability in the Lewisham Union. On September 7, 1914, he enlisted in His Majesty's Forces and thereafter continued to serve as a soldier until he was killed in action on August 25, 1918.

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On November 22, 1914, Ernest George Mungeam married at Sydenham in the Lewisham Union the pauper lunatic Gertrude Annie Mungeam who, after her marriage and during her husband's absence in France with His Majesty's Forces, returned to the residence of her parents at Battersea in the Wandsworth Union and continued to reside with them there until July 7, 1916, when she was admitted to the St. James' Infirmary in the Wandsworth Union by, and became chargeable to, the Wandsworth Union, and on September 27, 1916, she was sent to the Long Grove Asylum at Epsom. She was on those dates and during the said period and at the time of the making of the order of September 29, 1916, settled in the Wandsworth Union.

On September 29, 1916, the said order was made upon the Lewisham Guardians. Notice of appeal to quarter sessions was duly given by the Lewisham Guardians against the order.

It was contended on behalf of the Lewisham Guardians: (*a*) that the order was bad in law; (*b*) that the said pauper lunatic having no settlement in the Lewisham Union was not by reason of the alleged status of irremovability therein, or otherwise, removable or chargeable to the Lewisham Union; (*c*) that the said pauper lunatic would have been removable from the Wandsworth Union to her union of settlement but for the fact that her union of settlement was the Wandsworth Union; that she was not, therefore, removable from the Wandsworth Union or chargeable to the Lewisham Union; (*d*) that as the said pauper lunatic was not actually residing in Lewisham at the time when she was taken to the infirmary and the asylum, no order could be made against the appellant union. *East Retford Union* v. *Strand Union* (1) and other cases were cited in support of the above contention.

It was contended on behalf of the Wandsworth Guardians that as it was admitted that the husband of the said pauper lunatic had a status of irremovability in the Lewisham Union up to the time when he enlisted on September 7, 1914, which he kept until his death in 1918, his wife (the said pauper lunatic),

(1) (1862) 3 B. & S. 122.

having no other settlement than the husband's, and not being separated from him, had the same status of irremovability from the Lewisham Union as he had, and the fact that she was actually living elsewhere—namely, in the Wandsworth Union—at the time when she became a pauper lunatic did not prevent an order under s. 294 of the Lunacy Act, 1890 (1), being made on the Lewisham Union in which she had a status of irremovability. *Leeds Union* v. *Wakefield Union* (2) was cited in support of the said contention.

The Court of quarter sessions were of opinion that the contention raised on behalf of the Lewisham Guardians was correct and they therefore allowed the appeal and quashed the order of September 29, 1916.

The question for the Court was whether that decision was correct in law.

Rawlinson K.C. and *G. C. Whiteley* for the Wandsworth Guardians. The decision of quarter sessions was wrong. The husband of the pauper lunatic had his settlement in the Wandsworth Union, but having resided at Catford in the Lewisham Union for more than one year before he enlisted in the army he had, under s. 1 of the Poor Removal Act, 1846 (3), as amended by s. 8 of the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), acquired a status of irremovability

(1) Lunacy Act, 1890, s. 294: "All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics who would at the time of his removal have been exempt from removal to the parish of his settlement or the country of his birth by reason of some provision of the Poor Removal Act, 1846, as amended by subsequent Acts, shall be paid by the guardians of the union wherein the lunatic has acquired such exemption, and no order shall be made in respect of such lunatic under any provision contained in this or any other Act upon the guardians of the nion in which the lunatic is settled while the above-mentioned expenses are to be paid and charged as herein provided."

(2) (1857) 7 E. & B. 258; 26 L. J. (M. C.) 37.

(3) Poor Removal Act, 1846, s. 1: ". . . . no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for [one year] before the application for the warrant: provided always that the time during which such person shall be a prisoner in a prison, or shall be serving her Majesty as a soldier, marine, or sailor . . . . shall for all purposes be excluded in the computation of time hereinbefore mentioned. . . . ."

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in the Lewisham Union. The time during which he was serving in the army is, under s. 1 of the Act of 1846, excluded for all purpose from the computation of time, and therefore he retained his status of irremovability in the Lewisham Union so long as he served in the army, that is, until the date when he was killed. The Poor Removal Act, 1848 (1), provides that "whenever any person should have a wife or children having no other settlement than his or her own, such wife and children . . . . should not be removable from any parish or place from which he or she would not be removable." As therefore the husband would not be removable from Lewisham so also the wife would not be removable from Lewisham; the status of irremovability acquired by the husband being also acquired and retained by the wife, the pauper lunatic, and under s. 294 of the Lunacy Act, 1890, the expenses of her maintenance at the asylum have to be paid by the guardians of the union wherein she had acquired exemption from removal, and therefore the order was rightly made in the first instance that they should be paid by the guardians of the Lewisham Union. In *Leeds Union* v. *Wakefield Union* (2), Lord Campbell C. J. in the course of the argument said that s. 102 of 16 & 17 Vict. c. 97, which is in similar terms to s. 294 of the Lunacy Act, 1890, "does not seem to be confined to the case of a lunatic being removed to the asylum from the parish in which the irremovability is acquired," and in the judgment he said that it was "immaterial whether the pauper lunatic is sent to the asylum from the parish in which the status of irremovability exists, or from any other parish. If the status exists at the time when the lunatic is sent to the asylum, the burthen of paying the expenses is cast upon the parish of irremovability." The fact therefore that the pauper lunatic was sent to the

(1) Poor Removal Act, 1848, s. 1, after repealing the proviso in 9 & 10 Vict. c. 66, s. 1, enacted: "Provided always, that whenever any person should have a wife or children having no other settlement than his or her own, such wife and children should be removable from any parish or place from which he or she would be removable, notwithstanding any provisions of the said recited Act, and should not be removable from any parish or place from which he or she would not be removable by reason of any provision in the said recited Act."

(2) 26 L. J. (M. C.) 39, 40.

asylum from the Wandsworth Union is immaterial inasmuch as she had at that time a status of irremovability in the Lewisham Union. The case of *East Retford Union* v. *Strand Union* (1), upon which quarter sessions relied, is distinguishable, because there the wife had been voluntarily living apart from her husband and had consequently lost her status of irremovability. The Court of Criminal Appeal have held in *Rex* v. *Creamer* (2) that a husband who is serving in the army in France must be deemed to be living with his wife, and therefore the pauper lunatic and her husband must be deemed to have been living together.

Macmorran K.C. and *Naldrett* for the Lewisham Guardians. The order of quarter sessions was right. The cost of maintaining a pauper lunatic must be borne by the parish of his or her settlement, but if the pauper lunatic has acquired a status of irremovability then under s. 294 of the Lunacy Act, 1890, the expenses must be paid by the union wherein the lunatic has acquired exemption from removal. Sect. 294, however, only applies where the pauper lunatic is sent to the asylum from the parish in which he has acquired irremovability. If the pauper lunatic in this case had been resident in the Lewisham Union when she became insane and had been sent from Lewisham to the lunatic asylum, s. 294 would have applied, but the case finds that after her marriage she went back to live with her parents at Battersea in the Wandsworth Union where she was settled at the time the order was made. Wightman J. in the course of the argument in *East Retford Union* v. *Strand Union* (3) said: "To bring the case within the words of statute 16 & 17 Vict. c. 97, s. 102, the wife must, at the time of being conveyed to the asylum, be resident in the parish in which her husband has acquired irremovability." That dictum is directly in point in the present case. As the pauper lunatic at the time she was sent to the asylum was not resident in the parish in which her husband had acquired a status of irremovability, s. 294 of the Act of 1890 has no

(1) 3 B. & S. 122. (2) [1919] 1 K. B. 564.
(3) 3 B. & S. 126.

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application and the guardians of the union where she had a settlement—namely, Wandsworth Union—are liable for the expense of her maintenance. Irremovability means that a person cannot be removed to his parish of settlement, it only lasts as long as the person continues to live in the parish where he is irremovable; as soon as he leaves that place he ceases to be irremovable and becomes removable to his place of settlement. It is true that under s. 1 of the Poor Removal Act, 1846, the husband up to the date of his death was constructively resident in a parish within the Lewisham Union, and he therefore could not be removed to his place of settlement, but his wife, the pauper lunatic, was not residing there; the husband and wife were in fact living apart and the decision in the *East Retford Case* (1) therefore applies. If the husband, being a soldier on service in France, must be deemed to have been living with his wife, he must be deemed to have been living with her at the place where she was in fact residing—namely, at Battersea in the Wandsworth Union. It would be a complete fiction to regard them as living together at Lewisham where neither of them were in fact residing. Sect. 1 of the Poor Removal Act, 1846, contained a proviso that "whenever any person shall have a wife or children having no other settlement than his or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." That proviso was repealed and another proviso substituted by the Poor Removal Act, 1848, the test whether or not the wife or children should be removable being made to depend upon whether the husband or parent would or would not be removable from the parish. Lord Herschell L.C. in *West Ham Union* v. *Churchwardens of St. Matthew, Bethnal Green* (2), pointed out that the later statute of 1848 makes it clear that the test is not the removal but the removability of the husband or parent. The statute does not however say that the wife is to share her husband's status of irremovability in all respects, but only that she should not be removed if he could not be removed. It was held in *Churchwardens of Easton* v. *Church-*

(1) 3 B. & S. 122. (2) [1894] A. C. 230, 235.

wardens of St. Mary, Marlborough (1), that the widow of a soldier who had died abroad was removable from the parish where her husband had acquired a status of irremovability as she had not acquired her husband's status of irremovability. *Leeds Union* v. *Wakefield Union* (2) has no application in the present case, because there the lunatic had acquired a status of irremovability in Leeds, and it was a mere accident that she was seized with lunacy at the time of an excursion from her home for the benefit of her health; there had been no break of her residence with her husband.

Rawlinson K.C. in reply. If Mr. Macmorran's argument is correct to bring the case within the Lunacy Act a wife must at the time of being conveyed to the asylum be resident in the parish in which the husband had acquired a status of irremovability. It was held in *Reg.* v. *St. Ebbe's* (3) that the proviso to s. 1 of the Poor Removal Act, 1846, refers to the case of a person being legally removable and not to his being in fact removable or not by reason of his presence in the parish or absence from it. Wightman J. in the *East Retford Case* (4) admitted that it did not depend upon the physical capacity of the wife to be removed because he did not dispute that *Leeds Union* v. *Wakefield Union* (2) was rightly decided. The wife, under the Poor Removal Act, 1848, is in the same position as her husband who, so long as he was in the army, would be constructively resident in the Lewisham Union, irrespective of the place where he might be actually resident, and if he had become insane the Lewisham Union would have been liable for the expense of maintaining him. If the construction which Mr. Macmorran seeks to place upon the section is correct the expense of maintaining the husband, if he became insane while in the army, would fall upon the Lewisham Union, but the expense of maintaining the wife while insane would fall upon another parish, notwithstanding that, under s. 56 of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), the relief given to or on account of a wife is considered as having been given to the husband.

(1) (1867) 31 J. P. 214.
(2) 7 E. & B. 258; 26 L. J. (M. C.) 37.
(3) (1848) 12 Q. B. 137.
(4) 3 B. & S. 122.

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DARLING J. This case is, in my opinion, a most difficult one to decide. The facts are that a man named Mungeam, who had a settlement in a parish in the Wandsworth Union, lived from April 12, 1912, to September 7, 1914, at Catford, in the Lewisham Union, and became irremovable from the parish of Lewisham by reason of the length of his residence there. He enlisted in the army on September 7, 1914, and was killed on August 25, 1918. On November 22, 1914, he married a woman who became a lunatic and was removed to an asylum before the order which I will next mention was made. The order relating to the maintenance of the lunatic and charging her maintenance upon the Lewisham Union was made on September 29, 1916. The Lewisham Union appealed against that order and the Court of quarter sessions held that the order was bad. Thereupon the Wandsworth Union appealed to this Court.

In my view the dictum of Wightman J. in *East Retford Union* v. *Strand Union* (1), which was relied upon by Mr. Macmorran on behalf of the Lewisham Guardians, is inapplicable here. The husband of the woman who became lunatic was constructively living in a parish in the Lewisham Union from the moment when he, having no other residence but that one and being irremovable from that parish, joined the army. As long as he was serving in the army and liable to go wherever he was sent he must I think be deemed in law to be living in Lewisham. He had already become irremovable from that parish ; he had not acquired a residence anywhere else and could not have done so because he had to obey orders and go where he was sent. In my opinion it is quite immaterial where he actually resided during the time of his service in the army ; he was in the eye of the law residing in the parish of Lewisham within the Lewisham Union, and he could not do anything while he was serving in the army to alter his status of irremovability from that parish. In my opinion his wife also shared that status of irremovability by virtue of the Poor Removal Act, 1848, as she was the wife of a soldier, and it is equally immaterial where she was actually living. The

(1) 3 B. & S. 126.

fact that she lived in Wandsworth and not in Lewisham does not in my opinion in any way interfere with or cause her to lose her status of irremovability from Lewisham which she acquired by becoming and remaining the wife of Mungeam who was irremovable from Lewisham. I therefore have come to the conclusion that so long as her husband was upon the active list of the army it made no difference where she actually lived, whether at Wandsworth or Lewisham or anywhere else, and the fact that she happened to be living in Wandsworth when she became insane does not make the Wandsworth Union chargeable with the expenses of her maintenance because she was irremovable from the Lewisham Union. I think the decision in *Leeds Union* v. *Wakefield Union* (1) applies. All the reasoning in that case goes to affirm that this woman is chargeable to Lewisham Union and not to Wandsworth Union. The case of *East Retford Union* v. *Strand Union* (2) in my opinion does not apply for the reason that this case differs altogether from that case in the fact that the husband of this woman was a soldier, and that the place where he was actually residing is immaterial so long as he did not lose the status of being irremovable from the parish of Lewisham. I think therefore that the appeal should be allowed.

AVORY J. The question in this case is whether the order for payment of the expenses of the maintenance of the lunatic should be made upon the parish of her settlement or upon the place from which it is alleged she was irremovable. The justices who made the original order found that her last status of irremovability was in the parish of Lewisham, and upon that ground made an order upon Lewisham for payment of these expenses. Quarter sessions, however, reversed that order, and I agree that the judgment of the quarter sessions was wrong and that the original order of the justices was right.

I share the diffidence which was frequently expressed in this court by the late Lord Chief Justice, Lord Alverstone, when he said that the more he knew of cases of paupers and

(1) 7 E. & B. 258; 26 L. J. (M. C.) 37. (2) 3 B. & S. 122.

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pauper lunatics and poor law settlements and removals, the more doubt he felt whether any judgment that he ever delivered was right. In the present case it seems to me that a safe rule to follow is to construe s. 294 of the Lunacy Act, 1890, according to the plain meaning of the language of the section, without the introduction of other words which are not there. If it is construed in that way Mr. Macmorran's argument fails, because in order to maintain it he is compelled to ask the Court to read words into the section which are not there. He asks us to read the section in this way: "All incidental expenses and expenses of maintenance of a lunatic removed to an institution for lunatics who would at the time of his removal have been exempt from removal *from the place where he happens to be* to the parish of his settlement, ... shall be paid by the guardians of the union wherein the lunatic has acquired such exemption," but the words "from the place where he happens to be" are not in the section. It is true that considerable colour is given to the argument by an observation made by Wightman J. in *East Retford Union* v. *Strand Union* (1) as reported in Best and Smith. In the course of the argument of Mr. Poland in that case Wightman J. said that "to bring the case within the words of statute 16 & 17 Vict. c. 97, s. 102"—the Lunatic Asylums Act, 1853, which is substantially in the same terms as s. 294 of the Lunacy Act, 1890—"the wife must, at the time of being conveyed to the asylum, be resident in the parish in which her husband has acquired irremovability." It appears to me that that observation of Wightman J. is irreconcilable with the judgment of the Court in *Leeds Union* v. *Wakefield Union* (2) as reported in the Law Journal. In that case Lord Campbell, in the course of the argument, said: "Section 102"—that is of the Lunatic Asylums Act, 1853—"does not seem to be confined to the case of a lunatic being removed to the asylum from the parish in which the irremovability is acquired." I am unable to reconcile that observation with the observation of Wightman J. in *East Retford Union* v. *Strand Union*. (1) It may be said that they are both obiter,

(1) 3 B. & S. 126. (2) 26 L. J. (M. C.) 39, 40.

and being obiter they are both of equal value. But, what is perhaps more important, the judgments in *Leeds Union* v. *Wakefield Union* (1) appear to me to be also inconsistent with the observation made by Wightman J. Lord Campbell commences his judgment in these words: "We are all agreed that the language of s. 102 of the 16 & 17 Vict. c. 97 renders it wholly immaterial whether the pauper lunatic is sent to the asylum from the parish in which the status of irremovability exists, or from any other parish. If the status"—namely, the status of irremovability—"exists at the time when the lunatic is sent to the asylum, the burthen of paying the expenses is cast upon the parish of irremovability." Nothing could be plainer than that, and nothing appears to me to be more clearly in contradiction of the observation made by Wightman J. in the later case. Coleridge J. in *Leeds Union* v. *Wakefield Union* (1) says this: "In ss. 96 and 97"—of the Act of 1853, which correspond to ss. 289 and 290 of the present Act—"provision is made for the immediate payment of the expenses, and for inquiring into the settlement of a lunatic, and charging the parish of settlement with the expenses; and s. 98 provides for charging the expenses on the county if no settlement can be ascertained. These sections have all reference to the case where the settlement is not known, but is being searched for. But there is another class of cases where the settlement is perfectly well known, but it is immaterial in what place it exists by reason of the status of irremovability having been gained elsewhere; and it is to this class of cases that s. 102 is directed; and if we consider it as a proviso on sections which provide the machinery for making orders in the several other cases, it is quite clear that it must mean that an order is to be made on the parish of irremovability." If that is correct and the order is to be made on the parish of irremovability, then the only remaining question in this case is whether this woman had a status of irremovability at the time of her removal to the asylum, which took place on September 27, 1916, and if she had a status of irremovability, what was the parish in which she had that status. It is clear that her husband,

(1) 26 L. J. (M. C.) 40.

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who was a soldier serving in France at the time, had on that date a status of irremovability in the Lewisham Union, and it appears to me that by virtue of the Poor Removal Act, 1848, the wife, that is the pauper lunatic as she now is, had the same status of irremovability in the Lewisham Union, because the statute provides that the wife should not be removable from any parish or place from which the husband would not be removable. Therefore she had a status of irremovability from the Lewisham Union at the date of her removal to the asylum, and having that status of irremovability, then it seems to me, applying the words of s. 294, she was a person who at the time of her removal to the asylum would have been exempt from removal to the parish of her settlement. She could not be removed to the parish of her settlement because she was irremovable from Lewisham. For that reason I am of opinion that the judgment of the quarter sessions was wrong.

I only desire to add, with reference to *East Retford Union* v. *Strand Union* (1) that although the observation made by Wightman J. in the course of the case is entitled to great respect, yet when the judgments and the facts of that case are looked at, it appears to me that the real question before the Court was whether the statute 11 & 12 Vict. c. 111, which confers upon the wife the irremovability which belongs to the husband, had any application to a case where a husband and wife were living apart by consent. The judgment of the Court really proceeded upon the ground that in the case of a husband and wife living separate by consent the wife did not get the benefit of the provision of that statute. Wightman J., the learned judge who had made the observation in the course of the case, concludes his judgment with the words: "The statute 11 & 12 Vict. c. 111 does not apply." That was the pith of the judgment and the whole purpose for which that case was argued. For that reason I think that it does not conflict with *Leeds Union* v. *Wakefield Union* (2) and my judgment therefore is in favour of the appellants.

(1) 3 B. & S. 122, 127.

(2) 7 El. & Bl. 258; 26 L. J. (M. C.) 37.

SALTER J. I agree and have nothing to add.

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Appeal allowed.

Solicitors for Wandsworth Union: *W. W. Young, Son & Ward.*
Solicitors for Lewisham Union: *Newton & Lewin.*

R. F. S.

[IN THE DIVISIONAL COURT AND THE COURT OF APPEAL.]

K. B. D. 1919 *April* 7.
C. A. *June* 20.

VIGERS *v.* COOK.

Contract—Funeral Undertaker—Entire Contract—Essential term not performed—Right of Undertaker to recover on quantum meruit.

The plaintiff, a funeral undertaker, contracted with the defendant for the conduct of the funeral of the defendant's son. By the terms of the contract the coffin was to be taken into a certain church where a part of the funeral service was to be read over the body. The body was in an advanced state of decomposition. The plaintiff supplied a lead coffin, in which he left a vent for the escape of gas resulting from decomposition, and the coffin with the body in it was taken to a mortuary. Owing to a complaint by the mortuary authorities of an offensive smell from the coffin, the plaintiff had the vent closed, in consequence of which by the time the funeral had reached the church the coffin had burst and was leaking, and the smell was so offensive that it was impossible to take the coffin into the church, and the service had to be read without it. In an action on the undertaker's bill:—

Held, that the contract was one entire contract; that it was an essential term thereof that the coffin should be taken into the church for a part of the service, subject to the condition that the body was in such a state as to permit of that being done; that the onus lay on the plaintiff to prove that it was not owing to his default that this term of the contract could not be carried out, and he had not discharged that onus; and that he was not entitled to recover.

APPEAL from Westminster County Court.

The defendant, whose son had died in a military hospital in London, on July 31, 1918, gave a verbal order to the plaintiff, an undertaker, for the funeral. It was arranged that the body should be taken to a mortuary in Pimlico, and that on August 3, the day fixed for the funeral, it should be taken into a certain church at Richmond where the funeral service was

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to be read, and that on coming out of the church it should be placed on a gun carriage and handed over to the military, by whom the rest of the funeral was to be conducted. The plaintiff gave the defendant an estimate of the total cost at 49*l.*, exclusive of the charge for carriages for the conveyance of the relatives. The plaintiff took the body, which was in an exceptionally decomposed state even before leaving the hospital, to the mortuary, where he enclosed it in a lead coffin. On the following day, August 1, he caused the lid to be soldered down, and in accordance with the invariable practice made a pinhole in the lid to allow of the escape of gas. On August 2 he received a complaint from the authorities at the mortuary that there was an offensive smell from the coffin. He accordingly sent a man and had the pinhole stopped up. He did so with the full knowledge that there was a risk of the gas bursting the lead. On August 3 the body was taken down to Richmond for the funeral. On arriving at the church it was found that the coffin was leaking, owing to the lead having burst in consequence of the closing of the pinhole. It was accompanied by a very offensive smell, which prevented the coffin being taken into the church for the service. After that service was over the coffin was placed on a gun carriage and the interment was conducted by the military. In consequence of what had happened the defendant refused to pay the plaintiff's bill, whereupon the plaintiff sued him in the county court. The county court judge found that the plaintiff was in default in closing the pinhole and took upon himself the risk of the consequences. He held that the plaintiff had broken his contract in not carrying out the funeral with due regard to the feeling of the relatives and to the religious sentiment associated with funerals. He accordingly disallowed the cost of the lead coffin and also any profits on labour and materials supplied, and gave judgment for the plaintiff for the reduced sum of 42*l.* as upon a quantum meruit. The defendant appealed.

Hawke K.C. and *Russell Davies* for the appellant. The plaintiff was under the circumstances entitled to nothing at

all. The judge, having found that he had broken his contract, was wrong in allowing him a quantum meruit, for in order to justify that there must be evidence that the defendant elected to take the benefit of what had been done by the plaintiff, and made a fresh contract to pay for it (*Sumpter* v. *Hedges* (1)), whereas here the defendant had no choice in the matter, so that there is no ground for inferring a new contract. Further the judge was wrong in treating this contract as a contract to supply the items of which the funeral was made up, and not as a lump sum contract for one entire service. Here there was only one service to be rendered, namely, the conduct of a funeral in a decent and reverent manner, and in consideration of a lump sum of 49*l*. In the case of a contract such as that the contractor who has departed from the terms of the contract cannot recover anything for his services if the work that he has done has been of no benefit to the defendant, or is something entirely different from what was contracted for. *Per* Sankey J. in *Dakin & Co.* v. *Lee*. (2) Both those objections exist here. The funeral was not conducted decently and reverently, and the defendant got no benefit from it. In *Dakin & Co.* v. *Lee* (2) a builder had contracted for a lump sum to do repairs to a house, including the underpinning of a wall with concrete 4 ft. thick. In fact he only used concrete 2 ft. thick. He was also guilty of certain other departures from the terms of his contract of a like character. It was held that the building owner could not refuse to pay for the work that had been done, but there the builder's default could be remedied at a price, whereas here no expenditure of money can remedy the plaintiff's default in the conduct of the funeral. But if the plaintiff was entitled to recover anything as on a quantum meruit the judge below was wrong in the principle on which he assessed the value of the plaintiff's services. He allowed him what the work done cost him, whereas what he ought to have considered was not the cost to the plaintiff but the value to the defendant (*Farnsworth* v. *Garrard* (3)), and that could not amount to more than that of the cheapest funeral that could be supplied.

(1) [1898] 1 Q. B. 673. (2) [1916] 1 K. B. 566, 574.
(3) (1807) 1 Camp. 38.

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H. G. Robertson for the plaintiff. In order to disentitle the plaintiff to recover it must be shown that he refused to perform his contract. But an act of neglect on his part such as that complained of here does not show such a refusal, any more than it did in *Dakin & Co.* v. *Lee* (1.) This very closely resembles that case where, as here, the contract was to perform a number of different services. If there is any difference it is in favour of the present plaintiff, for the contract here was not for a lump sum, the 49*l.* was only an estimate. The contract here was to supply a number of different items, and the only one which was defective was the lead coffin, therefore the plaintiff ought to recover the total price less the cost of that coffin. The defendant did derive some benefit—from having the body kept in the coffin in the interval between the removal from the hospital and the funeral, from having it taken down to Richmond, from having the family conveyed there, and from the actual interment. For that benefit the plaintiff ought to be paid.

Hawke K.C. in reply.

A. T. LAWRENCE J. This is an unpleasant case and not a simple one. The plaintiff, an undertaker, sued the defendant for services rendered in connection with the funeral of his son. The claim was for 57*l.* 15*s.* Of that sum 8*l.* 15*s.* for the hire of carriages, which was the subject of a separate contract, was admitted to be recoverable. The balance of 49*l.* was disputed. The county court judge disallowed certain of the items claimed, but gave judgment for the plaintiff for 42*l.* The question is whether he was right in holding that the plaintiff was entitled to recover any of the items claimed. The plaintiff through his manager took an order for the funeral. He admitted that it was his duty in the conduct of that funeral to take the body into the church in order that the funeral service might be read over it, and that duty be admittedly did not perform. It appears that a lead coffin was provided, and the body was placed in it and removed to a mortuary, where it remained for three days. It seems to be

(1) [1916] 1 K. B. 566, 574.

the universal practice in the case of lead coffins to make a pinhole in the lid to allow of the escape of the gas resulting from decomposition. That was done in this case, but the plaintiff, having received a complaint from the mortuary authorities of a smell from the coffin, caused the pinhole to be closed, and he proceeded to conduct the funeral with the coffin sealed up. He knew quite well that it was not unlikely that the coffin might burst, but he was content to take the risk. The natural consequence happened, and by the time the funeral procession reached the church the coffin had burst and was leaking, so that it became impossible to take it into the church, and the service inside the church had to be read without the body being present. Under those circumstances is the plaintiff entitled to recover for the services which he in fact rendered? I think he is not. The contract was to conduct the funeral in a reverent manner such as to conform with the sentiments of the family. It was an essential part of the funeral that the body should be taken into the church so that the service might be read in its presence. The various items of which the plaintiff's bill is made up are mere accidentals, and if he fails to carry out the essential part of his contract he fails to carry it out altogether. The case of *Dakin & Co.* v. *Lee* (1) does not bear any comparison with the present case. There the default of the builder in carrying out the work was capable of being remedied by the expenditure of money, and he was held entitled to recover the contract price less so much as was required to make the defective work good. But it is impossible to apply that to a funeral. In my opinion the plaintiff's case fails, and there must be judgment for the defendant.

LUSH J. I have come to the same conclusion, though not without some doubt. We have first of all to see what was the contract. It was a contract by which the plaintiff undertook to conduct the funeral decently and reverently, and it was arranged that the body should be taken to a certain church at Richmond where a portion of the funeral service was to

(1) [1916] 1 K. B. 566.

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be read. The county court judge held that the contract was not an entire contract for one entire consideration, but was made up of a number of items, and that he had derived a benefit from a portion of the services rendered, and must consequently pay for them. With that I am unable to agree. It is true that the 49*l.* mentioned by the plaintiff when the order was given was an estimate only and not a fixed lump sum price, but the service which was to be rendered was in my opinion one service, namely, the conduct of the funeral in a proper manner. In consequence of the plaintiff's negligence in sealing up the coffin that service could not be performed. That being so, and there being a failure to carry out what was one entire contract, the plaintiff cannot recover any portion of his bill if either the work that he did was of no benefit to the defendant, or was entirely different from what he had contracted to do. As the funeral was not decently conducted and as the plaintiff had made it impossible to take the body into the church the defendant derived no benefit from what he did; and even if it could be said that he did derive a benefit it was one as to the acceptance of which he had no choice, and therefore there would be no grounds for inferring a fresh contract to pay a quantum meruit. Moreover I think that the work done by the plaintiff was entirely different from what was contracted for. For these reasons I think that, except as to the charge for the carriages which was not in dispute, the judgment ought to be for the defendant.

Appeal allowed; leave to appeal.

J. F. C.

The plaintiff appealed.

June 20. *Schiller K.C.* and *H. G. Robertson* for the plaintiff. *Hawke K.C.* and *Russell Davies* for the defendant.

BANKES L.J. The first question is, what was the contract between the parties? The plaintiff did not call his manager, with whom the contract was actually made; he was allowed to state what took place between his manager and the

defendant, the father of the deceased. He said that his manager "took the order for the funeral from Mr. Cook." Undertaking an order for a funeral indicates not a single but a complex operation, that is to say, a series of single operations; and naturally there must have been a discussion in reference to these various single operations which went to make up the entire transaction in respect of which the contract was made. For instance, there must have been an intimation as to where the interment was to take place, and as to the kind of coffin desired; and there must have been many other points discussed and decided upon before the contract which is expressed in this compendious phrase as "giving the order for the funeral" was concluded. But, having been concluded, in my opinion it is one entire contract. In this particular case I think it included as an essential term the conveying and providing the necessary number of bearers to convey the coffin into the church in which it had been arranged, as part of the contract, that part of the funeral service should take place. I regard that as an essential part of the contract, expressed by the plaintiff as "taking the order for the funeral." Not a word has been said against the plaintiff in this case. He is an undertaker of repute, and has had experience in carrying out funerals of this class. He took the order, and the order included the supply of the elm shell, the lead coffin, and the oak case. The county court judge has found that in every respect these were in accordance with the contract, and no complaint could be made as to them. The plaintiff gave evidence to show that in the case of some bodies enclosed in lead coffins it is necessary that there should be some small aperture left for the escape of gas, otherwise there is grave danger, if not certainty, of the coffin eventually cracking or bursting. The probability of this occurring, and the time at which it is likely to occur unless such an aperture is left, depend very much upon the state of the body, the temperature, and other matters, with which the plaintiff and his employees must be familiar. The body of this young officer was in an advanced state of decomposition at the time the plaintiff was called in, owing to the particular

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illness which was the cause of his death. There is no complaint as to anything the plaintiff did in providing the coffin, placing the body therein, or removing the coffin to the mortuary. Afterwards a complaint was made to the plaintiff by the mortuary authorities that there was an offensive smell from the coffin. Something had to be done; either the body had to be removed to some other place (of which there does not seem to have been any possibility or any opportunity), or the small aperture had to be closed. The plaintiff closed the aperture. The dates were these. The officer died in hospital in London on July 30. On July 31 the body was put into the shell. On August 1 the lead coffin was soldered down in the mortuary, and the pinhole was left. If the funeral had taken place on that or the next day what happened would probably not have occurred; but I assume that the date of August 3 for the funeral was fixed by the family. On August 2 the complaint came from the mortuary authorities, and on that day the pinhole was closed. As the natural result of closing the pinhole, the gas accumulated in the lead coffin to such an extent that by the time the coffin arrived at the entrance to the church the lead coffin had burst, and there was a leakage from the coffin, sufficient, in the plaintiff's opinion, to render it extremely undesirable that the body should be taken into the church, and he strongly advised that it should not be done; and as a result the body was not taken in.

In my opinion the contract which was made between the parties included, as I have said, as an essential term the conveying of the body into the church for a part of the service, subject to this condition, that the body was in such a state as to permit of that being done. The body in this coffin was not in that state, but the onus was on the plaintiff to establish that it was not in that state owing to no default on his part. In my opinion he did not discharge that onus. In considering whether he discharged the onus it is necessary to see what it was prima facie possible for him to have done. When on August 3 the body left the mortuary for Richmond the plaintiff knew that there was within the coffin a very

considerable accumulation of gas, such an accumulation as raised a question of doubt whether it could safely be removed on that journey. He considered it, and came to the conclusion that the risk could be safely taken. Assuming he had come to the conclusion that the risk could not safely be taken, as it turned out it could not, what was it possible to have done? It was possible to re-open the aperture and allow the gas to escape. Whether it was practicable was a different question, and the onus rested upon the plaintiff to prove that, though possible, it was not practicable. No evidence was given on that point. Another question arose which it was necessary to consider. Assuming it to be both possible and practicable to re-open the aperture, would the condition of things with the aperture re-opened have been equally offensive as it was with the coffin burst, or at any rate so offensive that the body could not have been carried into the church? There again the onus rested upon the plaintiff. It may well be that the condition of things was such that, even if the hole had been re-opened, it would not have been possible, reverently and decently, to take the body into the church. At present that is left unsettled. In these two matters I think that, although the plaintiff down to the time of the closing of the aperture did nothing other than what a competent and careful undertaker would do, in the difficult circumstances which arose when he felt it necessary to close the aperture, he has not shown that it was owing to no fault on his part that one essential term of his contract was not fulfilled; and it being one entire contract, in my opinion he fails in proving that he is entitled to any portion of the one entire price which was payable for the entire contract.

I wish to add one word with regard to *Dakin & Co.* v. *Lee*. (1) I merely desire to point out that the headnote, while it purports to be a headnote of the decision in the Court of Appeal, is in fact a headnote, and an accurate headnote, of the decision in the Divisional Court. The decision in the Court of Appeal proceeded upon different grounds from

(1) [1916] 1 K. B. 566.

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those in the Divisional Court, and therefore I think that the headnote must not be considered as being an epitome of the decision in the Court of Appeal.

SCRUTTON and ATKIN L.JJ. agreed.

Appeal dismissed.

Solicitor for plaintiff: *H. G. Rastall.*
Solicitors for defendant: *Wainwright, Pollock & Co.*

W. F. B.

1919
June 23.

SEVERN FISHERY BOARD *v.* O'MAY.

Income Tax—Fishery Board—Balance of Receipts over Expenses—Whether a Taxable Profit.

A fishery board acting under the provisions of the Salmon and Freshwater Fisheries Acts, 1861 to 1892, does not carry on a business analogous to a trade, and any balance of the moneys received by it for fishing licences or for penalties recovered from offenders over and above the expenses of maintaining the fishery does not constitute a profit which is assessable to income tax.

CASE stated by Commissioners for the General Purposes of the Income Tax Acts for the Division of Worcester City.

The Severn Fishery Board, hereinafter called the appellants, appealed against assessments of 23*l.* for the year ending April 5, 1913, and 106*l.* for the year ending April 5, 1914, made upon them under Case 6 of Sched. D of the Income Tax Act, 1842, and s. 2 of the Income Tax Act, 1853, on the basis of the average profits of the seven years immediately preceding the year of assessment.

By the Salmon Fishery Act, 1861 (24 & 25 Vict. c. 109), the general superintendence of the salmon fisheries in England was vested in the Home Office, and justices in quarter sessions were empowered to appoint conservators for the preservation of salmon and enforcing the provisions of the Act within their jurisdiction. By that Act certain modes of fishing were rendered illegal and punishable with penalties. That Act

was amended by the Salmon Fishery Act, 1865 (28 & 29 Vict. c. 121), whereby the Secretary of State was empowered to form fishery districts and to appoint boards of conservators for those districts. A board of conservators under that Act had power to appoint water bailiffs and other officers, to issue licences for fishing, to take legal proceedings against persons infringing the Acts, and generally to execute such works, do such acts and incur such expenses as they might deem expedient for the protection and improvement of the salmon fisheries within their district. They were to grant licences for salmon fishing at fixed prices, and the produce of the licences was to be applied in defraying the expenses of carrying the Salmon Fishery Acts into effect in their district. Fishing without a licence was prohibited under a penalty. Where a penalty was recovered on the complaint of the board the Court, unless for special reasons they thought it inexpedient to do so, were to direct the whole of the penalty to be paid to the board to be applied by them for the purposes of the said Acts. Under those Acts a board of conservators was appointed for the Severn fishery district. The powers of the Secretary of State were subsequently transferred to the Board of Agriculture and Fisheries, and by the Salmon and Freshwater Fisheries Act, 1907 (7 Edw. 7, c. 15), that Board was empowered to make a Provisional Order for the regulation of fisheries within the area defined by the Order. By the Severn Fisheries Provisional Order (1910) Confirmation Act, 1911, the area of the district was enlarged, the existing board of conservators of the Severn fishery district was abolished, and the appellant fishery board was constituted, which was to all intents and purposes to represent and be deemed a continuation of the existing board. By that Act the provisions of the Salmon and Freshwater Fisheries Acts, 1861 to 1892, were applied to the fishery district and board so constituted. The receipts of the appellants are derived from licence duties and fees for indorsing licences, and from fines imposed by justices on offenders against the said Acts. They are also in receipt of interest on certain bank deposits, but it is admitted that this interest is separately assessable to income tax. Their

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expenditure is governed by the Acts above referred to, and the money received by them has been applied in the payment of the wages and expenses of water bailiffs, the costs of prosecutions, and generally in carrying out the provisions of the Acts. On two occasions they expended money in the erection of fencing at weirs for the purpose of improving the fish passes there situate. The appellants endeavour as far as possible to make their expenditure in any year equal the amount of their receipts, the whole of their receipts being always required for the carrying out of their duties under the Acts. The assessments appealed against represented the balances of the receipts remaining in the hands of the appellants for the years 1912–13 and 1913–14 respectively after paying the expenses of maintaining the fisheries other than the expenses of erecting fencing at weirs, which latter expenses the surveyor of taxes contended were a capital expenditure and were not allowable as a deduction from receipts for the purpose of arriving at the balance of profits.

The Commissioners who heard the appeal held that the appellants were liable to income tax in respect of the excess of receipts over expenditure, and that in arriving at the amount of such excess they were not entitled to deduct the sums spent on the erection of the fencing above mentioned. They accordingly dismissed the appeal.

A. M. Latter for the appellants. The balance sought to be assessed is not a profit. The appellants are merely carrying out a public duty. No doubt where the person sought to be charged derives income from any of the sources mentioned in the various schedules to the Act of 1842 he is not relieved from taxation by the fact that he is obliged by statute to apply that income in a particular way. But here the appellants do not derive their income from any of the sources specially mentioned, they have no property in the rivers of their district, and do not carry on any trade or concern in the nature of trade. They are charged under Case 6 of Sched. D in respect of "annual profits or gains not falling under any of the foregoing rules, and not charged by virtue of any of the other

schedules contained in this Act." Even with regard to profits coming under that head it is necessary that they should be analogous to those derived from one or other of the sources specially mentioned—per Lord Blackburn in *Attorney-General* v. *Black*. (1) And for the purpose of determining whether the source of income is analogous it is material to consider in such a case as the present whether the class of persons from whom the money is received is co-extensive or not with that for whose benefit it is to be applied. In *In re Glasgow Corporation Waterworks* (2) the corporation were empowered by statute to bring water to Glasgow and to charge water rates on all the inhabitants, and any surplus of receipts over expenditure they were required to apply to making a reduction in the rate for the next year. It was held that that surplus was not a taxable profit because the parties rated and the parties benefited were the same. In *Attorney-General* v. *Black* (1) the Corporation of Brighton were authorized by statute to levy dues on all coal landed on the beach or brought into the town, and to apply the proceeds in erecting and maintaining groynes against the sea. It was held that the dues were taxable, for they were levied on all importers of coal whether inhabitants of the town or not, whereas the benefit went solely to the taxpayers of Brighton. In *Humber Conservancy Board* v. *Bater* (3) the question was whether the board were taxable on that portion of their income which was received from certain railway companies which were compellable by statute to contribute to the upkeep of the Humber navigation. It appeared that the board owned the bed of the river, and accordingly Scrutton J. held that they were liable under Sched. A; but on the supposition that that was not the fact he was prepared to hold that they were chargeable under Case 6 of Sched. D upon the ground that the companies so contributing and the persons benefited were not co-extensive. On that ground he distinguished *In re Glasgow Corporation Waterworks*. (2) In the present case the persons benefited by the appellants' expenditure and those paying for fishing

(1) (1871) L. R. 6 Ex. 308. (2) (1875) 1 Tax Cas. 28.
(3) [1914] 3 K. B. 449.

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licences are the same, namely the general public. It is not merely the inhabitants of the neighbourhood who benefit by the maintenance of the fishery. But even if this contention is wrong and the appellants' balance is an assessable profit, they are entitled for the purpose of arriving at that balance to deduct the expenditure on the fences erected at the weirs. There is no pretence for saying that it was a capital expenditure, for the fences were not erected on land belonging to them, and were not designed to attract custom and earn receipts.

T. H. Parr (*Sir Gordon Hewart A.-G.* with him) for the respondent. This case is practically covered by *Humber Conservancy Board* v. *Bater* (1). There as here there was a public body administering an Act of Parliament for the benefit of the public, and receiving money for that purpose from the public generally, but being found with a balance in its hands it was held chargeable to income tax. It is true that Scrutton J. distinguished *In re Glasgow Corporation Waterworks* (2), but he must not be regarded as agreeing with the decision of the Court of Session in that case.

Latter in reply.

ROWLATT J. This is an appeal by the Severn Fishery Board against an assessment to income tax under Case 6 of Sched. D. The board exists by virtue of legislation which, so far as is material to this case, begins with an Act of 1861. By the Salmon Fishery Act of that year the control of salmon fisheries was provided for through conservators, appointed by the Court of quarter sessions, who were empowered to prevent certain forms of fishing and other practices which might tend to destroy the value of the fisheries. But they were not provided with any funds to enable them to take the necessary steps, and in the year 1865 an amending Act was passed which recited that they had no such funds and remedied the omission by enabling them to issue licences at certain rates and by prohibiting people from fishing without those licences. Now that is the position, roughly speaking, which the Severn Fishery Board occupy. They issue licences within

(1) [1914] 3 K. B. 449. (2) 1 Tax Cas. 28.

their district, and thereby they acquire an income of about 1000*l.* a year. They expend it mainly in the provision of water bailiffs to watch the fisheries and in the necessary administrative expenses, but they also have power under the Salmon Fishery Act, 1865, and the Severn Fisheries Provisional Order (1910) Confirmation Act, 1911, to expend any moneys in their hands on any matter they may think conducive to the maintenance, improvement or development of the fisheries in their district. As a matter of fact if they have anything over after paying the wages of the water bailiffs and the other expenses of enforcing the Salmon Fishery Acts, they use that balance in improving a fish pass or doing some other work in alieno solo (for they have no property of their own) for the preservation of the salmon. It is in respect of that balance that they have been assessed to income tax. Now it is well settled law that it does not matter at all what the income is expended upon if the subject-matter is taxable. The leading case is *Mersey Docks and Harbour Board* v. *Lucas*. (1) There the board had an income from a taxable subject-matter, namely the docks, and the fact that they were obliged to apply their profits in a particular way was wholly irrelevant. At the same time it is always necessary in a case like the present to look at the purpose for which the income comes into existence ; as Montague Smith J. said in *Attorney-General* v. *Black* (2), though "the purpose to which the rate is applied cannot be taken into consideration, if in its nature it is a property or profit," it may "be looked on as one of the circumstances which determine whether it is more in the nature of a tax or of a toll." Several cases have been cited to me, but none of them assist me much in dealing with the present case. One was *In re Glasgow Corporation Waterworks* (3), where it was held that money received by the corporation from a compulsory district water rate was not taxable as profits ; it was no more taxable income than would have been the proceeds of a rate for the relief of the poor. On the other hand in *Attorney-General* v. *Black* (2), where the Corporation of Brighton were empowered

(1) (1883) 8 App. Cas. 891. (2) L. R. 6 Ex. 308, 311.
(3) 1 Tax Cas. 28.

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by statute to levy a duty on all coals landed on the beach or brought into the town, it was held that they were liable to pay income tax in respect of that duty, as it was more in the nature of a toll than of a rate. Then there was *Humber Conservancy Board* v. *Bater* (1), where the board, who had an interest in the bed of the river, were held liable to pay duty on contributions made by four railway companies in return for the keeping of the waterway safe for navigation as being profits from an inland navigation under Sched. A. The case, however, which I have to consider is a very different case. It was pointed out by Blackburn J. in *Attorney-General* v. *Black* (2) that the general sweeping-up words in Case 6 of Sched. D, "any annual profits or gains not falling under any of the foregoing rules," wide as they are, must not be treated as including every kind of income from whatever source derived, but must be read as limited to profits analogous to the other taxed forms of income. "They would not be liable except in respect of something of the same nature and kind as what had been previously mentioned; not, for instance, in respect of a borough rate, a poor rate, or a highway rate, because these are not within the analogy of the 'property or profit' previously described." Now what is the position of this board? The receipt of money by them has nothing to do with any sort of property, or any sort of undertaking in connection with which the subject of profit could be thought of. They have no property. They have no tolls nor any of the other things mentioned in the Act; they have no trade or concern in the nature of trade. They are simply acting as a public body protecting the fisheries for a particular locality, in the same way that the Government might protect them, and raising for that purpose a revenue by taking licences from the people who enjoy those fisheries. It is not like a profit-making concern at all. The revenue authorities have treated them as carrying on something analogous to a trade, and as making a profit out of the balance of the receipts over and above the expenses of upkeep. I do not think that is the right view at all. I think they make no profit. As in my view the resulting

(1) [1914] 3 K. B. 449. (2) L. R. 6 Ex. 308, 309.

balance is not a profit it becomes unnecessary to consider whether the fact that they expended the balance under the statutes in making improvements to the rivers and fish passes relieves them from liability to taxation. The appeal must be allowed.

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Appeal allowed.

Solicitors for the appellants: *Hanhart & Co.*, for *John Stallard & Son, Worcester.*

Solicitor for the respondent: *Solicitor of Inland Revenue.*

J. F. C.

McKENNA *v.* CITY LIFE ASSURANCE COMPANY.

1919

July 17.

Insurance, Life—Premiums payable Quarterly on specified Dates—Days of Grace allowed—Whether Premiums "due" on specified Dates or on Last of Days of Grace.

A policy of life insurance provided that the premiums were to be payable "on or before the last day of January, April, July and October" in each year. By the conditions attached it was provided that "Thirty days of grace without liability to fine are allowed for the payment of each renewal premium," and that "any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace, but will be kept in force for twelve calendar months from the date upon which the last premium became due," subject to payment of the arrear premiums and interest within that period. The premium payable on April 30, 1915, was paid. At that date the policy had acquired a surrender value. The premium payable on July 31, 1915, and all subsequent premiums were unpaid. On August 7, 1916, the plaintiff, who was assignee of the policy, with the object of keeping the policy on foot, offered to pay to the insurers the premiums then in arrear, contending that the twelve months mentioned in the conditions ran from the last of the days of grace, but the insurers refused to accept the premiums:—

Held, that the last premium "became due" on the date specified in the policy as that on or before which it was payable—namely, July 31, 1915; that the offer on August 7, 1916, to pay the premiums in arrear was consequently too late, and that the policy had lapsed.

TRIAL of action before Scrutton L.J.

By a policy of life insurance, dated December 9, 1907, the defendants insured the life of one James Sherry of Shotts

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in the county of Lanark, grocer, for the sum of 400*l.*, and covenanted that if the assured should "on or before the last day of every succeeding January, April, July and October thereafter until the death of the assured pay to the company the premium of 3*l.*" the defendants would pay the sum so insured upon the death of the assured. By the conditions of the policy it was provided as follows:—Condition 2. "Thirty days of grace, without liability to fine, are allowed for the payment of each renewal premium." Condition 3. "This policy shall not lapse by non-payment of any renewal premium before the expiration of three calendar months from the day on which such premium shall be due." Condition 17. "Any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace, but will be kept in force for twelve calendar months from the date upon which the last premium became due—the amount of premiums in arrear, together with interest thereon at the rate of 5 per cent. per annum, forming a first charge upon the policy. The policy may be reinstated at any time during the said twelve months on payment of the arrear premiums and interest." Sherry duly paid all the premiums upon the policy down to and including the premiums payable on April 30, 1915, at which date the policy had acquired under the terms of the conditions a surrender value. In June, 1911, he had assigned the policy together with certain heritable property to the defendants as security for an advance. In the year 1915 he was indebted to a number of other creditors, including the plaintiff, Mrs. McKenna, who was his sister. The defendants realized their heritable security, as the result of which they had a surplus in hand belonging to Sherry in addition to the policy of insurance; and as the several creditors made claims upon this fund the defendants instituted an action of multiplepoinding in the sheriff court of Lanarkshire at Hamilton. The sheriff in distributing the assets by a decree dated October 15, 1915, awarded to the plaintiff a certain sum of money and also the said policy which he directed to be delivered up to her. In arriving at his decision the sheriff treated the value of the

policy as being its surrender value. The defendants in pursuance of that decree assigned the policy to the plaintiff. At that date the premium payable on July 31, 1915, was unpaid, but as the defendants were under the mistaken impression that the sheriff had ordered the policy to be assigned to the plaintiff for the purpose of her surrendering it they did not send her the usual notices of premiums becoming due, and no further premiums were paid on the policy. The plaintiff was unable to make up her mind whether to accept the surrender value or pay the premiums and keep the policy on foot until the beginning of August, 1916, when she decided in favour of the latter alternative. On August 7, 1916, her solicitor wrote to the defendants offering to pay the premiums then in arrear if the defendants would let them know what was due. In reply to that letter the defendants stated that they understood the sheriff to have ordered the assignment of the policy to the plaintiff for the purposes of its surrender, and they refused to accept the premiums or entertain any request for the reinstatement of the policy, but they expressed their readiness to pay the amount of the surrender value at the date of the sheriff's decree. On December 9, 1916, Sherry died. The plaintiff then brought this action for a declaration that the policy was a subsisting policy and to recover the amount insured thereby.

Patrick Hastings K.C. and *Theobald Mathew* for the plaintiff. As the defendants were mistaken in supposing that the sheriff had directed the policy to be assigned for the purpose of its surrender they cannot justify their refusal to accept the premiums offered on August 7, 1916, if the policy was then subsisting; and it was then subsisting under the provisions of condition 17. By that condition the policy was not to lapse by reason of non-payment of renewal premiums until the expiry of twelve months from the date on which the last premium "became due." That date was August 30, 1915. A premium is not "due" until the last of the days within which it is payable, that is, the last of the days of grace. This is the rule in the case of bills of exchange. By s. 14,

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sub-s. (1.), of the Bills of Exchange Act, 1882, "the bill is due and payable on the last day of grace" notwithstanding that it is expressed to be payable three days earlier, and the Act is in this respect only declaratory of the common law: *Wiffen* v. *Roberts*. (1) There is no reason why the same principle should not apply to premiums under a policy. If this be so the offer to pay the premiums was in time, and the policy must be treated as not having lapsed.

[SCRUTTON L.J. referred to *Stuart* v. *Freeman*. (2)]

Rigby Swift K.C. and *Compton Smith* for the defendants. The twelve months ran from July 31, 1915. A premium is "due" within the meaning of condition 17 on the date when it is expressed to be payable in the body of the policy and not on the last of the days of grace. The judgment of Mathew L.J. in *Stuart* v. *Freeman* (2) supports this view. He says that if payment is made within the days of grace "it is be taken to have been made on the day appointed for payment," that is to say that although a payment within the days of grace may be effectual for the purpose of keeping the policy alive "the day appointed for payment" is that on which the premium really becomes due. The offer to pay on August 7, 1916, was consequently too late.

SCRUTTON L.J. In this case the defendants had issued a policy on the life of James Sherry, a grocer living at Shotts in Lanarkshire. That policy was assigned to the plaintiff, Mrs. McKenna, who brings this action for a decision that the policy is a subsisting policy, and for payment of the amount insured thereby, Sherry having in the meantime died. Sherry appears to have had many creditors, including both the plaintiff and the defendants. The defendants were secured creditors, and proceedings were taken in the sheriff's court in which the other creditors claimed the surplus fund remaining in the defendant's hands after they had satisfied their charge. That fund included the policy in question. The sheriff in the distribution of that fund treated the policy as equivalent to its surrender value, and directed that the policy should be

(1) (1795) 1 Esp. 261. (2) [1903] 1 K. B. 47, 55.

assigned by the defendants to the plaintiff as in part satisfaction of her share. That was accordingly done. James Sherry was then alive, and the plaintiff could not make up her mind whether it would be a better investment for her to take the surrender value of the policy or to go on paying the premiums on his life so as to enable her to get the larger sum which would accrue when he died. Nothing however was done by her in the way of paying the premiums, and matters drifted on until on August 7, 1916, her solicitors wrote to the defendants asking what premiums were then due in order that they might send them a cheque for the amount, and offering to continue paying the premiums quarterly. The defendants refused to accept the premiums, being under the mistaken impression that the sheriff had ordered the policy to be assigned to the plaintiff for the purpose of her surrendering it. They however expressed their readiness to pay to the plaintiff the surrender value. If the policy was at that time in existence their refusal to accept the premiums if tendered was in breach of the terms of their contract and relieved the assured from the necessity of making a formal tender. The question is whether at that time the plaintiff had a right to claim to pay the premiums, and that turns on the language of the policy. In the body of the policy the defendants covenanted that "if the assured shall on or before the last day of every succeeding January April July and October thereafter until the death of the assured pay to the company the premium of 3*l.*" they would on the death of the assured pay the sum insured. Turning to the conditions, by condition 2 thirty days' grace are allowed for the payment of each renewal premium. By condition 3, "This policy shall not lapse by non-payment of any renewal premium before the expiration of three calendar months from the day on which such premium shall be due." By condition 17, "Any policy which has acquired a surrender value will not immediately lapse if a renewal premium be not paid within the days of grace but will be kept in force for twelve calendar months from the date upon which the last premium became due," and it was thereby provided that the policy might be reinstated at any time during the said twelve months

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Scrutton L.J.

on payment of the arrear premiums and interest. Now it appears that all premiums on the policy had been paid down to and including the premium which was payable on April 30, 1915. The premium payable on July 31, 1915, and all subsequent premiums were unpaid. The refusal by the defendants to accept the premiums in arrear was in a letter written on August 10, 1916. If then the twelve months mentioned in condition 17 is to be calculated from the last day of July as mentioned in the body of the policy, the refusal to accept premiums was at a time when it was no longer possible for the plaintiff under the terms of the policy to keep it in force by paying premiums. If, on the other hand, the twelve months is to be calculated from the end of the thirty days of grace the refusal was within the period within which the policy might be kept alive by payment of premiums. The question under condition 17 is the same as that which arises under condition 3. When did the premium become "due"? Did it become due within the meaning of the policy on July 31 or August 30? A similar question might have arisen under the Bills of Exchange Act, but there it is expressly provided that "the bill is due and payable on the last day of grace." In this case I come to the conclusion that a premium becomes due on the day specified in the body of the policy as the day on or before which it is to be paid as a condition of the company's liability to pay the sum insured. I gather that from the wording of the policy; and I notice with some satisfaction that that is the view taken by one of the greatest judges who has ever sat in commercial causes in this country, Mathew L.J. In *Stuart* v. *Freeman* (1), where the question was whether payment of a premium within the days of grace, but after the death of the assured, was sufficient to prevent the policy from lapsing, he said: "In my opinion, the correct view as to the days of grace allowed by the terms of this policy is—that if payment is made within the time mentioned it is to be taken to have been made on the day appointed for payment, and is to have the same effect as if it had been made on that day," thereby

(1) [1903] 1 K. B. 47, 55.

drawing a distinction between the date up to which the premium continued payable and the date when it became due. Following that view I hold that the premium here was due on the day on or before which it was provided by the policy that it should be paid. The condition allowing days of grace means that if the premium is paid during those days of grace it shall be treated as if it had been paid on the due date. The result is that the plaintiff fails in her claim. Her claim for the surrender value is not in question in this action.

Judgment for the defendants.

Solicitors for the plaintiff: *Charles Russell & Co.*
Solicitors for the defendants: *Rawlings, Butt & Bowyer.*

J. F. C.

NATIONAL PROVIDENT INSTITUTION *v.* BROWN AND BROWN *v.* NATIONAL PROVIDENT INSTITUTION.

1919
June 17, *July* 24.

PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION *v.* OGSTON AND OGSTON *v.* PROVIDENT MUTUAL LIFE ASSURANCE ASSOCIATION.

Income Tax—Treasury Bills—Difference between Amount paid on Purchase and Amount received on Realization—Whether "profits on discounts" or Accretion to Capital—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35) *s.* 100, *Sched. D, Case* 3, *Rule* 2.

The amount by which the sums received by a holder of Treasury bills on their realization exceed the price at which he bought them is taxable as a "profit on discount" under case 3, rule 2, of Sched. D of the Income Tax Act, 1842.

That rule provides that the "profits on all discounts" are to be charged on "the full amount of the profits or gains arising therefrom within the preceding year":—

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Held, that that rule forms an exception to the general principle of income tax law in that it is not a condition of liability to taxation under it that the taxpayer should have made some profit of the description therein mentioned during the year of assessment. The reference in the rule to the profits of the preceding year is made not for the purpose of arriving at the quantum, but for that of defining the subject-matter of the charge.

Two cases stated by Commissioners for the Special Purposes of the Income Tax Acts.

NATIONAL PROVIDENT INSTITUTION *v.* BROWN AND BROWN *v.* NATIONAL PROVIDENT INSTITUTION.

1. At meetings of the Commissioners for the Special Purposes of the Income Tax Acts the National Provident Institution for Mutual Life Assurance, hereinafter called "the institution," appealed against assessments to income tax in the sums of 5422*l.* for the year ending April 5, 1917, and 20,566*l.* for the year ending April 5, 1918, made upon it by the said Commissioners.

2. The institution is a company incorporated by Private Act of Parliament. In each of the years ending respectively April 5, 1916, and April 5, 1917, the institution bought at the Bank of England certain Treasury Bills, some of which were held by it until maturity, others were sold in open market during their currency, and the remainder, being the whole of the Treasury Bills then held by the institution, were early in 1917 converted into 5 per cent. War Loan. In the year ending April 5, 1918, the institution did not hold or have any transactions in Treasury Bills. In each of the years ending respectively April 5, 1917, and April 5, 1918, the institution received and paid interest, from which income tax was not deducted, on short loans to and from bankers.

3. In the year ending April 5, 1916, the amounts received by the institution for Treasury Bills realized exceeded the amounts paid by it for Treasury Bills bought by the sum of 3552*l.* 5*s.* 7*d.* in the case of bills held to maturity and 1870*l.* 6*s.* in the case of bills sold or discounted, making in

all 5422*l.* 11*s.* 7*d.* In the year ending April 5, 1917, the amounts received by it for Treasury Bills realized exceeded the amounts paid for bills bought by the sum of 5567*l.* 8*s.* 1*d.* in the case of bills held to maturity, and 14,147 0*s.* 6*d.* in the case of bills converted into War Loan, while it made a profit on short loans to bankers of 851*l.* 19*s.* 6*d.*, making in all 20,566*l.* 8*s.* The whole of the War Loan held by it on April 5, 1917, was still so held on April 5, 1918.

4. The institution was not for any of the years ending April 5, 1916, 1917 and 1918, assessed to income tax under case 1 of Sched. D on the balance of its profits and gains. For the year ending April 5, 1917, the first of the assessments under appeal was made upon the basis of the amount of the differences between the amounts paid and the amounts received in respect of Treasury Bills realized within the preceding year. For the year ending April 5, 1918, the second of the assessments under appeal was made upon the basis of the amount of the differences between the amounts paid and the amounts received in respect of Treasury Bills realized, together with the amount of the difference between the interest paid to and the interest received from bankers on short loans, within the preceding year. The institution did not dispute its liability to assessment to income tax for the year ending April 5, 1918, in respect of interest on short loans on the basis of the net amount received within the preceding year, and the only questions raised by it related to its liability to assessment in respect of the differences between the amounts paid and the amounts received for Treasury Bills.

5. The Treasury Bills in question were issued under the Treasury Bills Act, 1877, and the regulations contained in Treasury minutes of May 31, 1889, and April 13, 1915. By the former minute provision is made for the inviting of tenders for Treasury Bills, for the issue of Treasury Bills with a fixed rate of interest to the Commissioners for the Reduction of the National Debt, or to such other person or persons as may be willing to buy the same, for the form of tender and the disposal of the amount received, and in the schedule the following form of Treasury Bill is prescribed :

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"London, ————

"This Treasury Bill entitles* ————————or order to payment of ———— pounds at the Bank of England out of the Consolidated Fund of the United Kingdom on the ————————.

"————————,

"Secretary to Her Majesty's Treasury.

"* If this blank be not filled in the Bill will be paid to bearer."

By the minute of April 13, 1915, it is provided that Treasury Bills shall be issued at fixed rates of discount at the Bank of England, and that the bills issued shall be in amounts of 1000*l.*, 5000*l.*, or 10,000*l.*, and shall be drawn for three six nine or twelve months as the case may be, that particulars of the bills offered, and the rate or rates of discount for the time being in force shall be notified to applicants at the Bank of England, and that the offer shall extend to the general public subject to the conditions that their Lordships reserve the right of rejecting any applications, and that the rates shall be subject to variation from time to time without previous notice. The bills bought by the institution were in the prescribed form, and were payable in some instances at three months, in others at nine months, and the remainder at twelve months after date.

6. It was contended on behalf of the institution—

(*a*) that the differences between the amounts paid and the amounts received for Treasury Bills were an accretion of capital, and not income or annual profits and gains chargeable to income tax;

(*b*) that the tax, if assessable at all, was assessable only on payment of the bills at maturity, and on the person holding them at that date, and the bills sold or converted into War Loan during their currency should be left out of account in computing any liability on the part of the institution;

(*c*) that in any case the assessment for the year ending April 5, 1918, could not be maintained, as the

institution did not hold or have any transactions in Treasury Bills in that year.

7. It was contended on behalf of the Surveyor of Taxes—

(*a*) that the sums in question, whether received at maturity or on sale or conversion of the bills, were profits on discounts chargeable to income tax under the Third Case of Sched. D (1);

(*b*) that a person is liable to income tax under the Third Case of Sched. D on the basis of the full amount of the profits or gains arising from the sources comprised in that case within the preceding year and whether any profits arise to him from such sources within the year of assessment or not;

(*c*) that the institution was in receipt of profits of a description comprised in the Third Case of Sched. D (namely, profits on loans to bankers) in each of the years of assessment, and was consequently chargeable to income tax under that case in each of those years on the basis of the full amount of the profits or gains from any source comprised in that case within the preceding year.

8. The Commissioners confirmed the assessment for the year 1916–17. As regards the assessment for the year 1917–18 they concurred in the view put forward on behalf of the institution that the rule of the Third Case of Sched. D only provides a measure of liability in respect of profits from a source existing in the year of assessment. They were further of opinion that the receipt during the year of assessment of interest of money, not being annual interest, did not justify

(1) "Third Case. The duty to be charged in respect of profits of an uncertain annual value not charged in Sched. A.

"First.—The duty to be charged in respect thereof shall be computed at a sum not less than the full amount of the profits or gains arising therefrom within the preceding year, ending as in the first case, to be paid on the actual amount of such profits or gains, without any deduction.

"Second.—The profits on all securities bearing interest payable out of the public revenue (except securities before directed to be charged under the rules of Sched. (C)) and on all discounts, and on all interest of money, not being annual interest, payable or paid by any person whatever, shall be charged according to the preceding rule in this case."

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the maintenance of an assessment on the amount of the profits arising from discounts on Treasury Bills in the preceding year where no such discounts were received or bills held or dealt in during the year of assessment. They thought that all the distinct and separate descriptions of profits comprised in the Third Case should be treated as separate sources of income and separate subjects of assessment. They accordingly reduced the assessment upon the institution for the year 1917–18 to the sum of 852*l.* in respect of interest of money. The institution appealed against the decision of the Commissioners relating to the assessment for the year 1916–17. There was a cross-appeal by the surveyor against the decision relating to the assessment for the year 1917–18.

Sir John Simon K.C., *Hon. W. Finlay K.C.* and *Bremner* for the institution. The Crown has the option of assessing an insurance company for income tax purposes in one or other of two ways. It may assess it under Case 1 of Sched. D on the profits or gains of the concern, or on the interest of its investments; but it must elect between the two, it cannot charge the tax on both: per Lord Dunedin in *Revell* v. *Edinburgh Life Insurance Co.* (1) Here the Crown has elected to tax the appellants on the interest of investments, and it seeks to include under that head the difference between the sums paid by them on the purchase of Treasury Bills and the sums received on realization as being "profits on discounts" within the meaning of para. 2 of Case 3 of Sched. D. The expression "discounts" there refers to commercial discounts, to the ordinary transactions of a discount house whose business it is to discount bills, and does not include the differences here sought to be taxed. Those differences are not income at all, but an accretion to capital. They are like the sum receivable by the purchaser of a reversion upon its falling in. But if they are assessable they are so only where the realization takes place at the maturity of the bills. Mere realization of a profit by the sale of the bills or their conversion into War Loan during their currency is not enough.

(1) (1906) 5 Tax Cas. 221, 226.

A Treasury Bill, which is usually in blank and payable to bearer, frequently passes from hand to hand many times before it matures, and it cannot be that the Crown could claim to impose a tax upon each vendor of the bill in turn who sold it at an advanced price. On the subject of the cross-appeal as to the liability of the institution to be assessed for the year 1917–18 in respect of the profits on realisation of Treasury Bills in the preceding year the Commissioners were right. The thing to be taxed is the income of the year of charge, for by s. 2 of the Income Tax Act, 1853, Sched. D deals only with "annual profits or gains." That points to the profits of the year of assessment. It is only for the purpose of arriving at the quantum that you look to the profits of the preceding year. The income of the preceding year does not create a liability in the year of charge, it only measures the liability arising otherwise. The case finds that in the year 1917–18 the institution had no transactions in Treasury Bills, so that it made no profits under that head at all and was consequently not assessable. If it had made any profits however small it would have been chargeable to the full extent of the large profits of the previous year, but having made none it escapes taxation under that head altogether. Where a person assessed ceases to carry on his trade or profession before the end of the year of assessment s. 134 of the Income Tax Act, 1842, provides that an abatement shall be allowed to him. It cannot be that he is in a worse position where the source of income has ceased before the year of assessment has begun. The fact that the institution derived profits from another of the sources mentioned in para. 2 of Case 3, namely, "interest of money" in respect of short loans to bankers, will not avail the Crown for this purpose. The different sources of income there mentioned must be treated as quite distinct and separate subjects of assessment.

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At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts the above-mentioned association appealed against assessments to income tax in the sums of 2659*l.* for the year ending April 5, 1917, and 8585*l.* for the year ending April 5, 1918. The association, which is an insurance company registered under the Companies Acts, had during the years ending April 5, 1916, and April 5, 1917, purchased and discounted or sold during currency Treasury Bills and War Expenditure Certificates, and also French Treasury Bills. In the year ending April 5, 1918, it did not have any transactions in Treasury Bills or War Expenditure Certificates, but it held War Loan stock. The assessment for the year 1916–17 was made on the basis of the difference between the amounts paid and the amounts received in respect of Treasury Bills discounted or sold within the preceding year. The assessment for the year 1917–18 was made on the basis of the difference between the amounts paid and the amounts received in respect of Treasury Bills and War Expenditure Certificates discounted or sold or paid off within the preceding year. The contentions were the same as in the former case. The Commissioners confirmed the assessment for the year 1916–17, and allowed the association's appeal against the assessment for the year 1917-18 for the same reasons as those given in the former case.

The association appealed against the decision of the Commissioners relating to the assessment for the year 1916–17. There was a cross-appeal by the Surveyor of Taxes against the decision relating to the assessment for the year 1917–18.

Hon. W. Finlay K.C. and *Bremner* for the association.

T. H. Parr (*Sir Gordon Hewart A.-G.* with him) for the Crown in both cases.

The profit on which the tax is claimed in this case is a

profit on discount. It cannot be any the less a discount merely because the persons making it do so only casually and not as a matter of practice. Then if such a profit is taxable at all it is so when it is made, that is to say on realization, which is independent of the question of maturity of the bills. Some of these bills were held to maturity, others were sold while current, and others were while still current converted into War Loan. The profit in the case of the first class of bills was made at maturity, in that of the second upon sale, and of the third on conversion. If a bill were sold twenty times in one year, each seller who got more than he paid for it would be taxable as on a discount. If these profits were profits on discount the institution cannot escape taxation merely because no profit was derived from that particular source in the year of assessment. If it could do so then the taxpayer, by buying and selling Treasury Bills in alternate years, could always escape taxation.

Cur. adv. vult.

July 24. ROWLATT J. read the following judgment:—These appeals relate to assessments to income tax in the case of each of the two companies in question for the years ending respectively on April 5, 1917, and April 5, 1918. The subject-matter of assessment in the first of these years was the profit made during the preceding year by the purchase and realization by sale, discounting, or holding to maturity of British Treasury Bills, the purchase and realization both having taken place during such preceding year. In the second the subject-matter was the same with the variation in the case of both companies that some of the bills were purchased before the preceding year, though realized within it. Further, in the case of the National Provident Institution the form of realization was that the bills were either held to maturity or converted into War Loan, none being sold or discounted in the market. In the case of the Provident Mutual Life Assurance Association, some of the bills were French Treasury Bills, and there was a small amount of War Expenditure Certificates. As regards the first year the

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Special Commissioners confirmed the assessments, and the point raised by the appeal of the companies is whether the profit made by the transactions in question is accretion to capital or profits and gains in the shape of discounts or interest of money within the Third Case of Sched. D. As regards the second year, the Special Commissioners discharged the assessments on the ground that in the year of assessment there were no transactions of this kind, and that there was therefore no source of income in the year of assessment to support an assessment measured in amount by the profits of the previous year. The Crown contend that this consideration is immaterial.

As regards the first point, it is clear that it is not every difference in amount between a sum payable in future and the same sum represented by cash down which is an annual profit or gain by way of discount, even though popularly the word " discount " may be used to describe it. As Sir John Simon pointed out, the difference between the cash and the credit prices of an article bought is commonly described as discount for ready money allowed by the seller, but it is not taxable as income under Case 3. So the difference between the face and the market value of a terminable debenture standing, as the phrase is, at a discount does not, when realized by holding the security till maturity, become such taxable income. Nor, it is to be hoped, will the Crown ever contend that the profit to be made by subscribing to the present Victory Bonds at 85, and holding them till they are drawn for redemption or applied in payment of death duties will be taxable income. It is true that in some cases obligations in futuro expressly bearing interest may command only a lower present value not merely because of the uncertain credit of the obligor but because of the insufficiency of the rate of interest borne by the security in the view of the market at the moment. But even to this extent the amount gained by buying and holding the security is not annual profits and gains. It is a difference in the value of the security as a whole as a marketable commodity. It seems to me that in each case one must look at the real nature of the transaction and

see whether the purchase of the future obligation at a discount is really an investment of money at interest or not.

Now in the simple case of the purchase of a Treasury Bill bearing no interest for such a sum as with interest at such and such a rate for the currency of the bill will give the face value, I can feel no real doubt that the transaction is simply one of lending money at interest. If a twelve months' bill for 105*l.* is sold for 100*l.*, surely the purchaser simply lends 100*l.* for a year at 5 per cent. If the face value is 100*l.*, and the present value has to be reached by a sum in proportion not giving a round sum in sovereigns as the result the transaction is the same. Unfortunately the problem involved in these appeals is not confined to this simple case.

In the first place these companies have been assessed in the second year in question not merely in respect of bills purchased and realized within the preceding year, but in respect of differences between the amount received in that year and the purchase price given before that year. On this principle a twelve months' bill bought in May, 1914, and paid in May, 1915, would be treated as yielding the whole of the profits and gains represented by the discount in the year ending April, 1916. This cannot be right, eleven-twelfths of the amount accrued in the previous year. This is a practical matter, and cannot be treated as adjusted by compensation over a series of years. In the first place the rate of tax may change so that it is material to be exact in determining in what year the income is taxable. Furthermore, these Treasury Bills were sold to individuals as well as to corporate bodies, and if one year is to be treated as bearing what is really one and eleven-twelfths years' income, the difference for super tax or abatement purposes may be of great importance. I am not insensible of the difficulty of treating interest accrued but not encashed as profits of the year when the question is not of taxing a trading concern on the profits shown by its balance sheet, but of taxing interest or discounts as such. Still, the step must, as it seems to me, be taken. The difficulty of adjustment as between the years does not lead me to modify my view that the profit in itself is taxable as an annual profit or gain.

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A more formidable complication arises where the Treasury Bill is not bought from the Government or is not held to maturity, but is either bought or sold in the market or both. I treat the so-called conversion of a Treasury Bill into War Loan as being in substance, as it was in form, a sale to or rediscount with the Government at a price representing the original price plus the proportion of interest or discount accrued. But where a Treasury or any other bill is bought or sold in the market the price depends on the market rate for money. A person who has held the bill for, say, two months may in a period of pressure affecting himself and the market generally, have to dispose of it at a price involving a loss of the whole or part of, or of more than, the interest for the time during which he held it. Conversely in times of ease he may sell it at a profit exceeding that interest, consequently, by the time the bill matures the bill may have passed through the hands of half-a-dozen persons who have made profits out of it aggregating a larger sum than the difference between the issue price and the face value, such extra profits being, of course, exactly equalled by losses made by other holders. How is this situation to be dealt with? Is the difference between the issue price and the face value to be treated as the taxable income on the bill and all assessed on the holder at maturity, or divided among the successive holders proportionately to their periods of holding? In neither case would the solution correspond with the truth. They have not received such profits. In my judgment the matter must be dealt with (subject to an adjustment between the years as already indicated) in the way the Special Commissioners have dealt with it, that is to say, the difference between the amount paid on purchase and that received on realization must be treated as a profit on a discount within the second rule of the third case. If any holder has made a loss he drops out to the extent of the loss, and the aggregate of the differences received will bear tax to the revenue, even though that aggregate exceeds the difference between the original purchase or issue price of the bill and its face value.

This disposes of the appeals by the companies, subject

only to two observations. Some of the bills in the second year in the case of one of the companies were French Treasury Bills of a currency, as I gather, of twelve months or less, as in the case of the British bills. Nothing was said in the course of the argument to suggest that there was any distinction between British and French bills for this purpose, and I treat them, therefore, as covered by my decision. The other point is this. In the case of the same company, and in the second year, some of the documents were not Treasury Bills, but War Expenditure Certificates. The case gives me no information as to the nature of these documents, nor do I remember to have been informed of it at the Bar. I must assume that they are on the same footing for this purpose as Treasury Bills. The appeals by the companies are therefore dismissed.

I have now to deal with the appeals of the Crown in respect of the year ending April, 1918. There is no doubt that the general scheme of the income tax is that it is payable in respect of a source of income existing in the year of assessment, though the amount is often measured by the results of previous years. So far as concerns the property in, or occupation of, land the mode of its collection and deduction (in the case of Sched. A) from rent necessarily involves this. Under Sched. C, and in all cases of taxation by deduction, the same principle no less necessarily applies. Under Sched. E the duty which in the schedule of 1842 is expressed to be "upon," and in the Act of 1853 "for or in respect of" offices and employments is to be charged on the persons having, using or exercising the offices and employments, and there is a provision for apportionment in the case of persons quitting the office or employment within the year. The tax is clearly in respect of offices or employments held in the year of assessment, notwithstanding that under Rule 4 the perquisites may be estimated on the profits of the preceding year or on an average of the profits of the three preceding years. Under Sched. D, first and second cases, the duty is expressed to be charged in respect of the trade or profession, and there are in s. 134 express provisions for apportionment in respect

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of broken years. It is well-settled income tax practice that assessability depends on the existence of the trade or profession. Omitting Case 3 and coming to Case 4, which deals with colonial and foreign securities, the tax is to be upon the sums that have been or will be received during the year, and ex necessitate the source of income must exist to support the tax. Case 5 deals with colonial or foreign possessions. Under this case fall nowadays shares in colonial and foreign companies and interests in foreign partnerships. What was mainly in view in 1842 was probably colonial or foreign estates, as can be judged from the reference to remittances and importations. It is to be observed that the duty is to be charged in respect of the "possessions" though it is charged on the average of the three preceding years. I put it to Mr. Parr during the argument whether he contended that a person who, at the time of the first War Loan (the interest on which bore tax by deduction), had sold foreign possessions, and brought home the money and invested it in that War Loan, would be taxed twice—namely, by deduction from his War Loan interest, and also retrospectively on the three years' average profits of the possessions which he had got rid of. Mr. Parr said he would not so contend. Therefore, for the purpose of this case, I take it that under Case 5 also assessability depends on the existence of the foreign or colonial possessions. Case 6 throws no more light on the matter than the only other case hitherto unnoticed—namely, Case 3—on which the point now before me immediately depends. I go, therefore, to that case.

This Case 3, as is pointed out in the note in Dowell's Income Tax Laws, originally had reference to the duty in respect of property of an uncertain annual value, such as mines and the like, now transferred to Sched. A and governed by special rules as to the computation of the profits. Even as it stands to-day, it has reference to the taxation of lands subject to special use, and provides that a further sum may be charged thereon in addition to their annual value as already assessed. It seems quite clear that neither in respect of the mines and the like as the section originally stood, nor to-day in respect

of lands specially used, could there be any tax if the property had ceased to be held.

It remains now to consider whether, under the Second Rule of Case 3, there can be taxation of a simply retrospective nature in respect of the profits of the preceding year, not had recourse to by way of measure, but charged as subject-matter. It is natural to suppose that the framers of the income tax would not desire to combine such a system with that which governs the other schedules and cases, especially with the system of taxation by deduction, because it would involve double taxation in the year of a change of investment. Further, even without such combination, a postponed tax like this has the inconvenience of letting the taxpayer go in the year when he has the income, and taxing him when he has parted with it, perhaps by bankruptcy, or of losing the tax altogether when the taxpayer has escaped by death. On the other hand, this may be the effect of the statute.

It seems to me that when one considers the taxation that is imposed by the other schedules and cases, the principle that the duty is imposed in respect only of an existing source is really no more than an implication which arises from the terms of its imposition in each case (land, a business, an office, a permanent investment, a foreign security or possession), and from the machinery created for its collection. There is no general enactment which expresses it. Now in the case of public unfunded securities, discounts and interest other than annual interest, there is really no permanent source which yields these gains, nor is there anything in the machinery which gives rise to the implication I have mentioned. It seems to me that the Legislature, holding fast to the idea that these gains must be taxed somehow, has taxed them in the succeeding year rather than provide for a belated assessment in respect of the year in which they were earned. In other words they have regarded the taxpayer himself as the only source which must exist in the year of assessment, and have taxed him upon anything which he may have made under the heads in question in the year before. It is to be remembered that this subject-matter of taxation

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(apart from the cases where the profits would be carried into the general accounts of a banking or other business taxed under Case 1) would be in the nature of casual profits, and not of great importance. There was no contemplation in 1842 of the unhappy experiment of bringing a vast funded loan like the War Loan 1929–1947 under the scheme of a case dealing with profits of an uncertain value.

The Special Commissioners, as I understand, took the view that it was only because there were no dealings with Treasury Bills in the year of assessment by these companies that the assessment had to be discharged. If there had been one dealing, however small, in the eleventh month the assessment would have stood. This seems to me unreasonable. I can see no continuance of a source of income in the circumstance that a person engages in two perfectly isolated transactions, though of the same nature in two successive years, with an interval, perhaps, of twenty-two months. If a man has 10,000*l.* on deposit at his bankers for the greater part of this year, is his liability to taxation on the interest to depend on whether next year he receives, perhaps, in the eleventh month a trumpery sum for interest because a purchaser of real estate from him has delayed completion for a few days, or because a judgment recovered for 20*l.* has carried interest under the statute for a week or two? It seems to me that the mere statement of this criterion shows that there is in the case of such interest and of profits from discounts no source upon the continuance of which liability to income tax can turn. A suggestion was thrown out by the Special Commissioners in the cases stated that the classes of profits which would in subsequent years be chargeable under the rule of the third case are assessable in the first year in which they arise under the rule of the sixth case so that the anomaly that the revenue would always lose one year's tax, if the liability disappeared with the source, would not arise. I do not know whether I rightly follow this suggestion; but if I understand it aright, if a man receives 1000*l.* from interest on short loans or discounts this year, and 10*l.* from a similar source next year, and nothing the year

after, then this year he pays on 1000*l.* under Case 6, next year he pays on 1000*l.* again under Case 3, and the year after nothing, so that in all he pays tax on 2000*l.*, having received 1010*l.* Conversely, if he receives 10*l.* the first year and 1000*l.* the next, he only pays in all on 20*l.* I can find no solution of the problem before me in this direction.

Upon the whole I can come to no other conclusion than that in the case of the discounts and interest of money on short loans mentioned in Rule 2 of Case 3 no question of the existence of any source in the year of assessment can arise.

A good deal was naturally said during the argument as to the position of the War Loan, 1929–1947, the taxation of which has been brought under the authority of Parliament within Case 3. In this case the dilemma which arises is indeed formidable by reason both of the vastness and of the nature of the subject-matter. On the one hand, if there is to be no tax in respect of a year's interest unless the stock is held in the succeeding year, the stock can be held tax free for every alternate year if not held in the intervening years. On the other hand, if the holding of the stock involves a hanging claim for income tax to fall upon the holder the year after he has parted with it, not only may he be taxed upon it (as already pointed out) after he has lost it by bankruptcy, but it is not an asset to its full face or market value in any balance sheet, unless reinforced by a suspense account providing for income tax. Further, if funds in settlement stand invested on such security, the hardships to tenants for life due to double taxation when upon sale or maturity of the loan the fund is transferred to a security the interest of which is taxed by deduction or otherwise in the year of receipt, or when the income goes over on the attainment of the age of twenty-one years by children or otherwise, will be of the most serious character. This problem is one of the most pressing kind in the cases of those numerous persons who contemplate leaving holdings in this loan as a provision for their families. I am, however, not required to deal with it on this occasion. I merely decide that in the case of profits from discounts

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there is no existing source to be looked for in the year of assessment in order to support the tax.

In the result the appeals of the Crown are allowed. The appeals of the companies are dismissed. The Crown will have the costs of both sets of appeals.

Appeals of both companies dismissed.
Appeals of Surveyors of Taxes allowed.

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Solicitors for National Provident Institution: *Hair & Co.*
Solicitors for Provident Mutual Life Assurance Association: *Hair & Co.*
Solicitor for the Surveyors of Taxes: *Solicitor of Inland Revenue.*

J. F. C.

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[IN THE COURT OF APPEAL.]

C. A. 1919

March 28; *May* 9.

ELLERMAN LINES, LIMITED *v.* H. & G. GRAYSON, LIMITED.

[1918 E. 830.]

Negligence—Contributory Negligence—Ship Repairers—Damage to Ship—Use of Fire—Inflammable Cargo.

A firm of ship repairers were riveting cleats to the weather deck of a steamer which at the instance of the Admiralty they were fitting with apparatus for protection against mines. The rivets were heated in a furnace on the weather deck, and lowered in a bucket through an open hatch to the 'tween decks, where a riveter drove them into holes bored in the weather deck to receive them. The steamer was discharging from a hold below the 'tween decks and a 'tween deck hatch was open directly below the open hatch on the weather deck, so that a cargo of jute in the lower hold lay exposed. A boy carrying a red-hot rivet in a pair of tongs to the bucket close by the weather deck hatch slipped on the deck, and the rivet shot over the coamings and through both the open hatches on to the cargo of jute and set it on fire.

In an action by the owners of the steamer against the ship repairers for damage to the ship and cargo:—

Held, by the Court (Bankes, Duke and Atkin L.JJ.), that the repairers were guilty of negligence in doing the work as they did while the jute was exposed.

By Duke and Atkin L.JJ. (Bankes L.J. dissenting) that, assuming the owners were guilty of negligence in not closing the 'tween deck hatch while the work of riveting was in process, they were not precluded from recovering, as the negligence of the repairers was the direct cause of the damage;

Radley v. *London & North Western Ry. Co.* (1876) 1 App. Cas. 754 followed.

By Atkin L.J. that the owners were not guilty of any negligence.

By Bankes L.J. that they were guilty of contributory negligence.

Judgment of Roche J. reversed.

APPEAL from the judgment of Roche J. in an action tried before the learned judge without a jury at the Liverpool Assizes.

The following statement of facts is taken in substance from the written judgment of Atkin L.J.

The plaintiffs were the owners of the *City of Edinburgh*, a steamer of 6254 tons gross and 4050 tons register. The defendants were a firm of ship repairers. The plaintiffs brought an action for injury to their ship and cargo on board caused by the alleged negligence of the defendants.

In May or June, 1918, the steamer was on a voyage from Calcutta and Rangoon to Liverpool and Glasgow with a mixed cargo consisting chiefly of rice for Liverpool and jute for Glasgow. At this time the Admiralty, acting under regulation 37*c* of the Defence of the Realm Regulations Consolidated (1), were insisting that vessels of this size should be fitted with what is known as the Otter gear as a protection against mines. On March 14 a direction was issued to the

(1) Defence of the Realm Regulations Consolidated.

Reg. 37*c*. "The Admiralty or the Shipping Controller may with the concurrence of the Board of Trade give directions that any British ship shall forthwith be and shall continue to be . . . . equipped with such apparatus as may be specified in the directions for securing the safety of the ship. . . . . If any ship with respect to which any such directions have been given puts to sea from any port in the United Kingdom without complying with the directions, the owner or master of the ship shall be guilty of a summary offence against these regulations, and if the ship is at any time subsequently found at any port of, or in the territorial waters adjacent to, the United Kingdom, the ship may be seized and detained."

Reg. 43. "No person shall obstruct . . . . any officer or other person who is . . . . acting in accordance with his duty under these regulations, and if he does so shall be guilty of an offence against these regulations."

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plaintiffs to communicate with a firm of Vickers, Ld., who alone manufactured and supplied the apparatus and who, through their sub-contractors at various ports, did the necessary work for the account of the Admiralty. On May 23, 1918, Messrs. George Smith & Sons, of Glasgow, acting apparently as managers for the steamer, wrote to Vickers, Ld., as follows: "With reference to yours of January 17 last, the above vessel is now on her way to this country, and we should be glad if you would keep her in view for equipment with Otter mine defence gear on arrival. Your Hull agent advised us under date January 18, 1918, that she could not be equipped at that time as suitable gear was not at hand. The vessel is due in Liverpool about the 4th prox. and we shall be much obliged if you will pass the necessary instructions to your Liverpool depot asking them to keep in touch with Messrs. Hall Line, Ld., Tower Building, there, as to the position of the steamer. Kindly let us know what period, if any, will be required in dry dock for fitting this ship."

The order to do the work was given on behalf of Vickers, Ld., to the defendants on June 10 in these terms: "Otter Installation Order Form. SS. *City of Edinburgh*, No. 2756. We are instructed by Vickers, Ld., to place with you the following order in connection with the above-mentioned vessel. Fit boom and stopper and other gear to our instructions. Terms usual. Note (1.) The priority assigned to Vickers, Ld., for the work in connection with this order is Admiralty P.V. Class 1. . . . . (2.) The work to be put in hand at once and the installation to be completed with the utmost dispatch. (3.) To insure prompt settlement of the account it is essential that the invoice be sent in duplicate to this office."

On June 17 the steamer arrived at the Hornby Dock, Liverpool. She was moored with her starboard side to the quay, and proceeded to discharge her Liverpool cargo. She had six holds of which the largest, No. 3, had two hatches opening from the main or weather deck into the 'tween decks. The forward and larger hatch, also numbered 3, was 32 ft. 6 in. by 16 ft. or 520 sq. ft.; the other, No. 4, on the bridge deck was 10 ft. 10 in. by 10 ft., or about 110 sq. ft. There were corre-

sponding hatches from the 'tween deck to the lower hold. The coamings of the hatches on the weather deck were about 3 ft. high; those of the hatches on the 'tween deck were about 9 in. high.

In the 'tween decks of No. 3 hold some timber was stowed. That was cleared away, and before June 20 the stevedores had commenced discharging the cargo in the lower hold, which consisted mainly of rice. Both the 'tween deck hatches were used to discharge the lower hold, and, in accordance with the usual custom of the port, once taken off they were not replaced. In the forward end of the hold jute was stowed and on top of the jute were bales of cotton and bags of rice. The stevedores discharged this cotton and rice and then proceeded to handle the rice at the after end of the hold, which they discharged through No. 4 hatch. They did not further use No. 3 hatch except for the purpose of stowing and subsequently discharging certain movable ventilators round which the rice was stowed. The weather was hot and rice is a hot cargo. According to the defendants' marine surveyor it was "a great convenience" to have No. 3 hatch open, although "not necessary; not absolutely necessary." According to the foreman stevedore it was doubtful whether the stevedores' men would have continued working without the ventilation afforded by this large open hatch. Under these conditions for the first two or three days the discharge proceeded; everything was normal; the conditions were the ordinary conditions of discharging such a cargo.

On June 20 Mr. Sinclair, the representative of Vickers, Ld., arrived to take measurements for the planning of the work of fixing the Otter gear. The work required the attachment of cleats to the weather deck on both the starboard and port sides. This was done by riveting the cleats to the deck—a proper mode of attachment, as was found by the learned judge, but one which involved the use of fire and introduced an element of considerable danger, as the jute in No. 3 hold was lying exposed immediately below the 'tween deck hatch. There was some question whether the chief officer, Mr. Wyper, who took over his duties on June 19, did or did not warn

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Mr. Sinclair of the danger of fixing the gear while the cargo was being discharged. The foreman stevedore lifted part of the weather-deck hatch to show the jute to Mr. Sinclair, who, however, did not observe the open hatchway beneath. He marked out the places for the cleats and the necessary rivets, of which the nearest was about 10 ft. from the coamings of No. 3 hatch on the weather deck. He then went away, knowing that there would be danger if the 'tween-deck hatch was open, but believing that it was closed.

On the next day, June 21, the defendants' workmen came to execute the work under the supervision of their charge-hand, Wilson. They had first to make the necessary holes in the steel deck to receive the rivets; then they had to fix the red-hot rivets from below, that is from the 'tween decks. The holes were made by the oxy-acetylene process, and this occupied June 21 and 22 and was continued afterwards.

The riveting began on June 24. Wilson saw the jute exposed beneath the open hatchway; he appreciated the danger and took measures to meet it. He provided a bucket of water which was primarily intended to put out any fire caused to stray material by sparks from the oxy-acetylene flame, but was continued when riveting only was in process. The way in which the rivets were heated and conveyed to the riveter working in the 'tween decks was as follows: A portable forge was placed on the weather deck about 12 ft. away from No. 3 hatch. When a rivet was red hot it was taken naked in a pair of tongs by a boy to a bucket standing near the coamings of the hatch and having a rope attached to it, one end of which was fastened to a ring bolt of the hatch. The bucket had a layer of ashes in it. The boy placed the rivet with the tongs in the bucket. He then lowered the bucket down the hatchway where a second boy received it in the 'tween decks. He placed it by the side of the open hatch, took out the red-hot rivet with the tongs and conveyed it to the riveter, who in due course fixed it. While this was being done the jute was fully exposed and some of it was lying close beneath the opening of the 'tween-deck hatch.

The boy on the weather deck was carrying a red-hot rivet

to the bucket beside the open hatch. The steamer had a slight list towards the quay. Grains of rice from the discharged cargo were lying on the deck. The boy slipped; he threw forward his arms to save himself; the rivet flew over the coamings and down the open hatch, fell on the jute, set fire to it, and thus caused the serious damage complained of.

Roche J. held that the damage was caused by the joint negligence of both parties and gave judgment for the defendants.

The plaintiffs appealed.

Langdon K.C., *A. H. Maxwell* and *A. T. Miller* for the appellants.

Rigby Swift K.C., *Douglas Hogg K.C.* and *Greaves Lord* for the respondents.

The arguments of counsel sufficiently appear from the judgments.

Cur. adv. vult.

May 9. The following written judgments were delivered.

BANKES L.J. This is an appeal from the judgment of Roche J. in an action tried by him at the Liverpool Assizes without a jury. The appellants are the owners of the steamship *City of Edinburgh* and the respondents are shipbuilders and repairers. The action was brought by the appellants to recover damages for the serious loss sustained by them in consequence of a fire caused, as they alleged, by the negligence of the respondents.

The respondents denied the negligence, and set up in the alternative that the appellants were guilty of contributory negligence. The learned judge came to the conclusion that both parties were equally to blame and gave judgment for the respondents. Although there is now no real dispute as to the main facts or as to the law applicable to those facts, the case is one which presents to my mind considerable difficulty as to the true inference which should be drawn from the facts.

The facts are as follows: At the time when the fire broke

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out on board the *City of Edinburgh* she was lying in the Hornby Dock in the port of Liverpool discharging from her No. 3 hold. She was carrying a mixed cargo, including a quantity of jute, which to the knowledge of both the appellants and the respondents is highly inflammable. The jute which was set on fire was stowed immediately below the hatch in the 'tween decks, which hatch was immediately underneath the hatch in the well deck. The cargo in the 'tween decks had been discharged, and, as a consequence, if the covers were off both the above hatches, anything dropped down the hatch in the well deck would fall through the hatch in the 'tween decks and so directly on to the jute.

Some months before the date of the vessel's arrival at Liverpool the appellants had been informed that it had been decided by the Admiralty and by the Shipping Controller, with the consent of the Board of Trade, that all vessels of a class of which the *City of Edinburgh* was one, should be ordered under article 37 (*c*) of the Defence of the Realm Regulations to fit Otter apparatus as a defence against mines. No opportunity for so fitting the *City of Edinburgh* had apparently occurred until her arrival at Liverpool. The duty of affixing this gear had been entrusted by the Government to Messrs. Vickers, Ld. They instructed the respondents to do the necessary work while the vessel was in dock and discharging her cargo. A question was raised at the trial as to the proper method of doing the work having regard to the fact that it was done while the discharge of the vessel was proceeding. The learned judge came to the conclusion that it was proper to use rivets in the fixing of the gear, and no complaint was made of his decision on that point. The gear had to be fixed on the well deck and the rivets had to be driven from the 'tween decks in holes made in the well deck to receive them. For the purpose of heating the rivets a small portable heater was used which was placed on the well deck about 12 or 14 feet from the coamings round the No. 3 hatch of No. 3 hold. These coamings were about 3 ft. high. When a rivet was required, a boy took it out of the heater with a pair of tongs and carried it in the tongs to the side of the hatch, where he

placed it in a bucket which he then lowered down to the 'tween decks. On June 27 the boy unfortunately slipped when carrying the rivet to the bucket, and the rivet flew out of his hand and fell through the two hatches, and so on to the jute, setting it alight, and causing the very serious damage which was the subject-matter of this action.

The appellants' case at the trial was that the method adopted by the respondents of conveying the rivet to the 'tween decks was grossly negligent, having regard to the fact that they knew that the cover of the hatch over the lower hold was off, and that the jute was thus exposed to the risk of a red-hot rivet falling upon it. The respondents denied the alleged negligence; but alternatively they alleged that the appellants were themselves negligent in allowing the cover of the hatch over the lower deck to remain off during the time when, as they knew, the red-hot rivets were being carried in the way complained of. At the trial a considerable amount of evidence was given as to whether the method of working adopted by the respondents was or was not negligent, and whether there were not other and safer ways in which the work could have been done; and evidence was also given as to the possibility or practicability of keeping some cover over the 'tween deck hatch while discharging was going on from the lower hold through another hatch. The learned judge clearly came to the conclusion that the appellants could and ought to have kept the cover on the hatch while the respondents were doing the riveting in the way in which they were doing it. He did not express himself so clearly as to the respondents' conduct. I think however that he did find that their method of doing the work was negligent, as he speaks of their methods as being inappropriate for the unusual conditions. As a result the learned judge found both parties equally to blame. He appears to have founded his judgment on this point mainly upon the view that, if such a highly dangerous operation as fixing this gear by means of rivets, while the ship was discharging, was necessary, the responsible representatives of the appellants and of the respondents should have met and decided upon the proper course to follow, instead of each party leaving the other

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to take the necessary precautions. I do not think that the attention of the parties was sufficiently directed to this point to make it a satisfactory ground on which to base a decision. The decision must, I think, depend upon the view taken with regard to the action of the respondents in adopting the method which they did adopt of passing the red-hot rivets from the well deck to the 'tween deck, knowing that the hatch in the latter deck was uncovered, and with regard to the action of the appellants in allowing this hatch to remain uncovered knowing, as they did know, of the danger to which the vessel was exposed by the adoption of that dangerous method of working.

In my opinion both parties were negligent in what they did, or omitted to do. The respondents ought to have realized that the method of working they adopted, which involved the passing of red-hot rivets from the one deck to the other immediately over an exposed portion of such an inflammatory article as jute, was so dangerous as to be inexcusable, and that if no other method of conveying the rivets was possible the work should have been discontinued until the hatch, under which the jute lay, was covered or in some way protected. It is not necessary, in my opinion, to consider whether the alternative methods of dealing with the rivets suggested by the appellants' witnesses were or were not practicable, because the danger was, in my opinion, so obvious that the work ought to have been discontinued if no covering to the hatch was provided. Wilson, who was in charge of the work for the respondents, appears to have accepted this view after the event, because in cross-examination he appears to have said that if he went on another job of the same sort he would have the 'tween deck hatches covered before he started again. It does not require Wilson's admission however to satisfy me that the method of dealing with the red-hot rivets adopted by the respondents was, under the conditions under which they were working, a negligent method.

I pass now to consider the conduct of the appellants in reference to the method of working adopted by the respondents. The officer in charge of the ship during the whole time that the

respondents were working upon her was the first officer, a man of the name of Wyper. He joined the ship at Liverpool on June 19 while she was discharging. The respondents started work upon the ship soon after Wyper took charge of her. From the first Wyper strongly objected to the proposed work being done so long as there was jute on board, on the ground of the danger of doing such work in close proximity to such a cargo. He made the objection in the first instance to Mr. Sinclair when he came on board to take the necessary measurements before the work was actually commenced. The work appears to have actually commenced on Friday, June 21. Wilson was in charge. Wyper complained to him specifically both with regard to the use of the oxy-acetylene process for drilling the holes for the rivets, and with regard to the riveting and the heating forge being where it was. It is obvious from the fact that these complaints were made that Wyper realized the danger to the ship and cargo from the method of working adopted by the respondents ; and he must also have realized that the danger was infinitely greater if and so long as the jute was allowed to be exposed owing to the hatch immediately below which it was stowed being uncovered. Wyper's attitude appears to have been that having protested to the respondents' representative as to their method of working he had done all that was incumbent upon him to do. He made no report to the office of his owners. He did nothing. Having charge of the ship he could undoubtedly, if so minded, have given the necessary orders to have the 'tween deck hatch covered, either by putting on the cover, or by rigging up some temporary covering which would not have obstructed the ventilation through the hatch, if such ventilation was necessary. If either course had been taken the very serious damage, amounting to many thousands of pounds, arising from the falling of the red-hot rivet upon the jute, would have been avoided. Was Wyper justified under the circumstances in remaining satisfied with the protests which he had made ? In my opinion he was not. If he could by taking any reasonable precaution have avoided injury to his owners' property from the negligent system of working

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adopted by the respondents, it was, in my opinion, his duty to take it. This I think follows from the rule of law laid down in such cases as *Butterfield* v. *Forrester* (1), *Bridge* v. *Grand Junction Ry. Co.* (2) and *Dowell* v. *General Steam Navigation Co.* (3), all of which are referred to in the passage in the judgment of Lindley L.J. in the *Bernina*. (4) In *Bridge* v. *Grand Junction Ry. Co.* (2), Parke B. states the rule thus: "Although there may have been negligence on the part of the plaintiff, yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendants' negligence, he is entitled to recover: if by ordinary care he might have avoided them, he is the author of his own wrong." It does not appear from the evidence whether Wyper, until after the fire had occurred, ever considered the question whether it would be desirable or practicable to cover the 'tween deck hatch, so as to avoid danger from the method of working adopted by the respondents. At the trial he recognized that a cover would have afforded complete protection from a falling rivet, but he contended that the closing of the hatch was not practicable, partly because of the ventilators piled in the hatchway, and partly because the closing of the hatch would have deprived the lower hold of light and ventilation which were required to enable the men to continue the discharge from the lower hold. Roche J. did not accept any of these contentions. I take the same view of them as the learned judge, and I do not think that it is necessary to discuss the evidence upon the point in detail. The ventilators could have been moved in a very short time. The light, according to some of the appellants' witnesses, was not an important matter, and any necessary ventilation could easily have been provided by rigging up a covering which would have protected the jute while not stopping the ventilation.

Assuming that the view which I take upon the evidence is the correct one, what is the proper inference to be drawn as to the responsibility of the parties respectively for the very

(1) (1809) 11 East, 60.
(2) (1838) 3 M. & W. 244, 248.
(3) (1855) 5 E. & B. 195.
(4) (1887) 12 P. D. 58, 89.

serious damage to the ship and cargo which was caused by the fire? Is it that the respondents are liable because they might, by stopping the work when they found that the appellants persisted in leaving the hatch in the 'tween deck open, have avoided the mischief which followed; or is it that there has been as much want of reasonable care on the appellants' part as on that of the respondents, and that all that the appellants can say with truth is that they have been injured by their own carelessness and the respondents' negligence combined? If the proper inference is the first of the above propositions, then the case falls within the second rule laid down by Lord Penzance in *Radley* v. *London and North Western Ry. Co.* (1), and the respondents are liable. If, on the other hand, the second of the above propositions is the proper inference, then the case falls within rule 3c laid down by Lindley L.J. in the *Bernina*.(2) The two rules are as follows: In *Radley* v. *London and North Western Ry. Co.* (1) Lord Penzance says this: "The first proposition is a general one, to this effect, that the plaintiff in an action for negligence cannot succeed if it is found by the jury that he has himself been guilty of any negligence or want of ordinary care which contributed to cause the accident. But there is another proposition equally well established, and it is a qualification upon the first, namely, that though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." In the *Bernina* (2) Lindley L.J. says: "The cases which give rise to actions for negligence are primarily reducible to three classes as follows:— 1. A. without fault of his own is injured by the negligence of B., then B. is liable to A. 2. A. by his own fault is injured by B. without fault on his part, then B. is not liable to A. 3. A. is injured by B. by the fault more or less of both combined, then the following further distinctions have to be made:— (a.) if, notwithstanding B.'s negligence, A. with reasonable

(1) 1 App. Cas. 754, 759. (2) (1887) 12 P. D. 58, 89.

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care could have avoided the injury, he cannot sue B.: *Butterfield* v. *Forrester* (1); *Bridge* v. *Grand Junction Ry. Co.* (2); *Dowell* v. *General Steam Navigation Co.* (3); (b.) if, notwithstanding A.'s negligence, B. with reasonable care could have avoided injuring A., A. can sue B. (*Tuff* v. *Warman* (4); *Radley* v. *London and North Western Ry. Co.* (5); *Davies* v. *Mann* (6)): (c.) if there has been as much want of reasonable care on A.'s part as on B.'s, or, in other words, if the proximate cause of the injury is the want of reasonable care on both sides, A. cannot sue B. In such a case A. cannot with truth say that he has been injured by B.'s negligence, he can only with truth say that he has been injured by his own carelessness and B.'s negligence, and the two combined give no cause of action at common law. This follows from the two sets of decisions already referred to." I quite accept the view that the initial fault was the fault of the respondents, and that the final act in the chain of negligent acts and omissions was an act of a servant of the respondents, and that probably, to borrow an expression from the case of *Dowell* v. *General Steam Navigation Co.* (3), the preponderance of blame rests on the respondents. There is however no apportionment of liability in a case like the present. As I am differing on this point from the other members of the Court, I naturally express my opinion with great hesitation; still I cannot help feeling that in the present case attention must be directed to the entire period during which the respondents' method of working was in operation rather than to the first or last act of either party. For nearly a week before the rivet fell on the exposed jute the respondents were engaged in this extremely dangerous and negligent method of working. At any moment during that time the appellants could, by adopting what appears to me to be a simple and a reasonable precaution, have converted that dangerous method of working into what for present purposes must be considered as a safe method. If this had been done

(1) 11 East 60.
(2) 3 M. & W. 244.
(3) 5 E. & B. 195.
(4) (1858) 5 C. B. (N. S.) 573.
(5) 1 App. Cas. 754.
(6) (1842) 10 M. & W. 546.

there would have been no fire. Under these circumstances I think that the effective cause of the fire was the combined negligence of the appellants and of the respondents, and that there has been as much want of reasonable care on the appellants' part as on the respondents' part.

The case therefore appears to me to fall directly within the rule laid down by Lindley L.J. which I have already quoted, and I consider that the appeal fails. As however the other members of the Court think differently the appeal will be allowed with costs and judgment entered for the plaintiffs for an amount to be ascertained.

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DUKE L.J. The claim of the plaintiffs, who are the appellants upon this appeal, arises from the fact, that by means of a red-hot rivet accidentally dropped by a servant of the defendants into a mass of jute, which was part of the cargo of the plaintiffs' ship *City of Edinburgh*, the ship and cargo were burned. The respondents, who were the defendants in the action, are shipbuilders and repairers, and they were engaged at the time of the accident in carrying out certain work upon the plaintiffs' ship in Hornby Dock, Liverpool, under circumstances which arose out of the state of war. The Minister of Shipping, by virtue of his powers under regulations made in pursuance of the Defence of the Realm Act, 1914, had directed that the plaintiffs' ship should be fitted with apparatus for giving protection at sea against mines. As was stated by counsel for the defendants at the trial, the Board of Admiralty had ordered Messrs. Vickers, Ld., to fix the apparatus upon the ship at the cost of the public exchequer and Messrs. Vickers had entrusted the execution of this work to the defendants. While the vessel was on her voyage to Liverpool, the plaintiffs had asked with regard to the intended work that Messrs. Vickers should "keep her in view for equipment on her arrival." The works involved in fitting the apparatus in question included the attachment of cleats to the well deck of the ship by means of red-hot rivets. Seventy-six rivets were intended to be used, sixty-seven were in fact used, and it was the sixty-eighth which fell through

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the hatchways into the ship's lower hold among the cargo of jute. The defendants had applied this apparatus at Liverpool to some hundreds of ships but not to a vessel with a cargo of jute on board. The work was necessarily dangerous, even in an empty ship. Holes in the deck where the cleats were to be placed were pierced by means of an acetylene process, which, owing to necessary emission of burning sparks, involved dangers of fire apart from those which led to the loss in question. A portable forge placed on deck was used for heating the rivets. Each rivet, when sufficiently heated, was removed from the fire by a lad, and carried by him in pincers and in a red-hot state as far as the open hatchway, and there put into a bucket and lowered to the level of the deck below. There a workman received the bucket and carried it with the rivet in it to the actual place of work.

Work was commenced upon the ship by the defendants on June 21 and continued until June 27. On the 27th the ship had a list, and the deck was rendered slippery by rice spilled from the cargo in course of discharge. The rivet-carrier was wearing boots. He slipped on the deck, and the red-hot rivet which he was holding in the pliers escaped and fell down the hatchway, and through a hatchway below on to the jute in the hold.

The case of the plaintiffs at the trial was broadly that the defendants ought to have used such precautions as would have prevented the mischief which happened. They specified certain methods which their witnesses said were in common use. The defendants asserted that their mode of doing the work was proper and necessary. They also said that if the hatchway of the lower hold had been closed, no red-hot bolt could have reached the jute, that the management of the ship's hatches rested with the plaintiffs, that the ship's chief officer knew the method in which the defendants' men were doing the work, and that with such knowledge he kept the hatches open, and so caused the accident. The plaintiffs' counsel replied that in any case the negligence of the defendants was "the last negligence and the effective cause of the fire."

The learned judge gave judgment for the defendants on the ground that the parties had been jointly guilty of negligence which had led to the fire. In the course of his statement of his reasons, the learned judge says that "except perhaps in a very general way in the case of the chief officer, danger from a rivet had not been thought of." He accepted the contention of the defendants that the isolation of the lower hold by the closing of the 'tween-deck hatchway was an obvious precaution which would have ensured the safety of the jute, and finds that the chief officer was negligent in not having closed it. He also finds the defendants "jointly" to blame because their representative did not ask that the hatchway should be closed. I have had difficulty in coming to a conclusion as to the grounds for the finding of joint negligence of the parties, and I pause here to say that I think no joint character can be attributed to the acts of the parties by reason of the relation in which the parties were placed by the statutory obligations which were being complied with, or of the existence of any contractual relation between the parties. The position of the defendants as sub-contractors for the Admiralty seems rather to render them independent of than joint actors with the plaintiffs, and no facts were proved, as I understand the evidence, which go to make the parties mutually responsible each for the other's acts and omissions. Again, no facts were proved which would warrant a finding that the method in which the defendants did their work was concurred in by the plaintiffs, so as to preclude the plaintiffs from relying upon any allegation of negligence which might properly be based upon the facts, apart from their concurrence. Among the facts found by the learned judge, or admitted, are these. The chief officer protested against the doing of the work while the cargo was on board, and he and the chief stevedore called attention to the jute. The chief officer also made a separate protest against the use of the acetylene process. Upon the defendants' allegation that their method of doing the work was proper and necessary, there is not an express finding, but I take the judgment to involve a conclusion that the method was proper, and was no more risky than was

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inevitable if riveting had to be done. The accident which in fact happened, however, would have been avoided if the defendants' workmen had passed the rivets over the ship's side and through a porthole, or had lowered them through an opening in the deck away from the hatches, or had carried them across the deck in a bucket, all of which methods the plaintiffs' counsel and witnesses suggested. Necessity, in the legal sense, could not have been found upon the facts, inasmuch as there was no duty imposed upon the defendants by law which required them to do the work irrespective of unavoidable risks. They were free agents in the matter, and they could at any rate have discontinued the work. The negligence of which the chief officer is found guilty is that, when he realized that the defendants intended to carry on their operations—under Admiralty orders as they said—while the ship's cargo was in part undischarged, he proceeded with the discharge, or allowed the stevedores to do so, in the ordinary way, and with all the hatchways open, including that in the lower deck, above which the bolts were lowered to the level of that deck. His view and that of the chief stevedore was that, with the hatch in question closed, the discharge of the cargo could not have been satisfactorily carried on. I propose to deal with the case on the assumption that he was wrong, as the learned judge has found.

Assuming the alleged negligence of the chief officer, how does the case stand? The unsafe state of the jute in the lower hold became on June 21 a condition under which the defendants were doing their work and it so remained. On each of the sixty-eight occasions on which red-hot rivets were handled in near proximity to the cargo of jute, the defendants' servants accepted the risk of so handling them. The defendants' foreman who was in sole charge of the work, stated explicitly what he did with regard to this risk. Before the trial he had made a report to his employers about the accident, in which he used these words: "knowing the inflammable nature of the jute, I took the usual precautions." In cross-examination on the subject he said, "I took the responsibility of providing against any fire happening." He added, "We

take the same precautions when there is no cargo in the ship," and being further asked whether the precautions in this ship were the same as were taken in an empty ship, he replied, "Yes, absolutely so." There were in fact no precautions taken in regard to the process of handling the rivets in proximity to the jute. The witness admitted that the risk which caused the fire never occurred to him, and said that if he had had to do the work over again, with the knowledge he then had, he would have required that the hatches should be closed.

It is to be observed that no representative of the defendants who was concerned in the execution of the work on the *City of Edinburgh* appears to have appreciated at all the special liabilities of persons who bring into proximity to the persons or property of others things dangerous in themselves, as fire is.

In my opinion, the defendants were negligent from the time when they commenced work until the time of the actual occurrence of the fire. On each of the sixty-seven occasions when a red-hot rivet was allowed to be handled by a boy above an open hatchway where there was jute, the so handling it was a negligent proceeding. The sixty-eighth instance occurred under the added elements of danger, which were disregarded, that the deck was aslant by reason of the vessel's list, and was slippery by reason of the rice scattered upon it. The negligence of the defendants at this point of time was subsequent to the alleged negligence of the plaintiffs. To the condition of facts so appearing, I apply the rules laid down in *Radley* v. *London and North Western Ry. Co.* (1) Firstly, the plaintiff cannot succeed if he has been guilty of negligence which contributed to the cause of the accident; secondly, although the plaintiff is guilty of such negligence yet if the defendant could in the result by the use of ordinary care and diligence have avoided the mischief which happened, the plaintiffs' negligence will not excuse the defendant. In my opinion, the defendants' negligence was the immediate cause of the plaintiffs' loss.

I have already referred to the conclusion of the learned judge that the fire was due to "joint negligence." I think, as

(1) 1 App. Cas. 754, 759.

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I have said, that none of the acts of the parties were in truth joint acts. They were engaged respectively in undertakings which for all relevant purposes were independent undertakings. Each took or neglected to take his various steps during the time in question without regard to the other. Each was accountable for the negligence of his own servants. This was frankly recognized by Mr. Douglas Hogg in his argument on the hearing of the appeal.

In my opinion, this appeal should be allowed and judgment should be entered for the plaintiffs for damages to be assessed by a referee in the manner upon which the parties provisionally agreed at the trial.

ATKIN L.J. The question in this case is whether the damage by fire to the plaintiffs' ship was due to the negligence of the plaintiffs, or of the defendants; or, if the latter, whether the plaintiffs were guilty of contributory negligence. Roche J. who tried the case without a jury has found that it was due to the negligence of the plaintiffs, and as I read his judgment has not found the defendants to blame. The question raised is of importance to persons engaged in shipping and ship-repairing, and requires careful examination of the facts. There does not appear to be much dispute as to the actual facts, though the proper inferences to be drawn from them are much debated. If there is any question of the credibility of a witness the finding thereon of the learned judge is of very great weight. [The Lord Justice then stated the facts set out at the beginning of this report, and proceeded:] The question is whether the defendants by their servants were guilty of negligence causing the damage. I can but conceive of one answer. The defendants brought their fire to the ship. They knew that beneath the opening in the deck lay the inflammable jute; they organized a system which required a boy to carry a naked red-hot rivet up to the opening in the deck. They lower the red-hot rivet in an open receptacle right over the inflammable material. Another boy again handles the red-hot rivet in close proximity to the opening, this time with a protection only nine inches high. As a direct

result of a system the boy who slipped was required to approach the opening where any mishandling of the rivet would be extremely likely to cause it to fall through the opening, in which case it must cause a conflagration. In my judgment, if ever there was a case where negligence earned a vituperative epithet, this is the case. Now can it be said that the work had necessarily to be done and that there was no other way of doing it? As far as the ship was concerned, as the learned judge has found, the chief officer protested on the ground of inconvenience. There seems no reason to suppose that there would have been any objection on the ship's part to the work being postponed. She was to spend two days in dry dock, and only part of the work was in any case to be done in Liverpool; the rest was to be completed in Glasgow. There seems no reason why, if the work could only be done in this manner, it should not have been postponed until the whole of the cargo in this hold, which is the only hold likely to be affected by the work, had been discharged. But there was evidence that the work could have been done differently. Two alternative methods were suggested. At the time of the accident, on the starboard side there was a staging fixed outside the ship just abreast of the work. It would have been possible to have passed the rivets when required to a boy on the staging who could have passed them through a porthole in the 'tween decks much nearer to the riveter than the after end of the hatch. This method was criticized because it was said there might have been oil floating on the surface of the Hornby Dock; and if a rivet slipped it might have caused a conflagration in the dock. There was no evidence that there was any oil on the surface of the dock. In the absence of any such evidence it would appear that the argument is that, in order to avoid the possible risk of setting fire to oil that was absent, it was better to take the actual risk of setting fire to jute that was obviously present. A further alternative was to make a drop hole in the deck and so convey the rivet either direct or down a pipe into a bucket on the 'tween decks. Both these methods would have avoided the fatal error which necessitated the rivet being carried naked right up to the coamings of the open

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hatch in order that it might be lowered. Even the expedient suggested by the plaintiffs of taking the bucket to the rivet instead of the rivet to the bucket, as to which the defendants' charge-hand said it was six of one and half a dozen of the other, would have had the same beneficial effect. The learned judge's view seems to be that any of these expedients would have left the danger as it was, inasmuch as they all involve handling the naked rivet at some stage or other, and at that stage the boy might have slipped with consequences as in the event which happened. The material difference, however, appears to be as stated above, that the handling of the rivet would have taken place never less than ten feet or more away from the hatch with no necessity for the boy to approach the hatch at all. If he did slip at that distance away there is a 3 ft. coaming to the weather-deck hatch and a 9 in. coaming to the 'tween-deck hatch, and though a rivet thrown on a steel deck has some resilience, it would not be likely to make a leap 10 ft. wide and 3 ft. or even $\frac{3}{4}$ ft. high. It seems to me clear that the methods suggested would have materially diminished the general danger of the operation while in all probability they would altogether have prevented the particular occurrence which in fact caused this damage. It has to be remembered that the defendants were engaged in performing a dangerous operation, and there is no need to cite authority for the proposition that anyone using such a dangerous element as fire is under an obligation to take special care lest he injure his neighbour or his neighbour's property. I consider it plainly established that there was a lack of care on the part of the defendants' servants which in fact produced the damage complained of. I am puzzled by the learned judge's finding on this matter: "If the defendants failed at all," he says, "it was in this, that it should have occurred to some one acting for them to suggest the hatches should be closed." He goes on to say that it was a matter proper for the consideration and decision of a higher official on each side as to how the work was to be arranged and safety ensured. But he proceeds to say that it is unnecessary to decide whether this omission to determine jointly on a safe method was negli-

Considered. DAVIES v. SWAN MOTOR CO. [1949] 2 K. B. 291

gence, because if it were it was joint negligence. I think his language justified the defendants in claiming that the learned judge had acquitted them of negligence, though it is difficult to see how the omission to determine jointly upon a safe method was capable of being negligence, unless in the absence of this joint determination the method actually pursued was unsafe. However, if the learned judge did acquit the defendants of negligence I entirely disagree with him, and the only question that appears to me to be capable of debate in this case is Were the plaintiffs guilty of contributory negligence ?

The negligence alleged is that the plaintiffs, appreciating the danger as they did, omitted to close the 'tween-deck hatches of No. 3 hold and so shut off all danger of fire passing through the hatch. That such an operation was physically possible and that it would have avoided the danger is indisputable. The question is whether the plaintiffs were guilty of a want of reasonable care in not doing it. The facts appear to me to establish that the plaintiffs were engaged in the very ordinary operation of discharging a ship in an ordinary and reasonable way at the time when the defendants came on board. The defendants, it appears to me, were bound to exercise care, not generally but in relation to the conditions they found. They might have found an empty ship or a ship laden with steel billets, in which case the peril from fire would be small. They did find a ship in process of discharge containing an inflammable cargo exposed to view. They should have adopted precautions commensurate with the danger. If a workman is sent to my house containing inflammable material to work with fire, am I to remove the source of danger, or is he to take precautions which will avoid danger ? If a man comes to my premises containing an oil tank is he to abstain from smoking in its vicinity or am I to remove the oil tank ? And if he chooses to smoke there am I precluded from recovering because I did not remove the oil tank but allowed him to continue at his peril ? The doctrine of contributory negligence cannot, I think, be based upon a breach of duty to the negligent defendant. It is difficult to suppose that a person owes a duty to anyone to preserve his own

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property. He may not recover if he could reasonably have avoided the consequences of the defendant's negligence. But the application of the doctrine must have relation to the circumstances, and it appears to me that there may be circumstances, as here, where a danger is introduced by the defendants without there being any obligation on the part of the plaintiffs to seek to avoid it. But whether this is so or not, to my mind the plaintiffs' servants were not guilty of any want of reasonable care in not closing the hatches. It was customary to keep them open; they could not have been closed without removing the rice ventilators; it was, as the defendants admitted, "a great convenience" to have them open for light and ventilation. The ship was in time of war discharging a food cargo, and it was at least possible—I say no more—that the Liverpool stevedores would have stopped discharging if the hatch had been closed. The rivets were being sent down intermittently, sixty-eight in about three and a half days, though the hatch would have to remain closed all day. The balance of convenience seems all one way when one remembers that there were alternative methods of despatching the rivets. In these circumstances it appears to me a hardship on the chief officer to say that he was guilty of negligence in exercising his judgment to allow the work to continue in the same manner as before the defendants came.

Lastly, even if, contrary to my view, the chief officer was guilty of any want of care, did it contribute to the damage? He did nothing active; he left things as they were; all the conditions were known to the defendants; they appreciated the danger. Even if the danger was increased, or even created by the chief officer's omission to close the hatches, the defendants, for the reasons I have given above, could have avoided it by reasonable care. Suppose that they had asked the chief officer to close the hatches, and he had said and said unreasonably, "I cannot in the interests of the discharge," would the defendants have been justified in persisting in running the risk they did, and have been immune if the anticipated danger happened? It seems to me unnecessary in this case to consider whether what is known as the doctrine of *Davies* v. *Mann* (1)

(1) 10 M. & W. 546.

requires investigation, whether the negligence on either side is static or dynamic, or which negligent act is last in point of time, or which is the true cause; or whether the question can be adequately explained by considering the parties to be in pari delicto, as to which one may express a doubt whether a negligent plaintiff can be said to have committed a delict at all. I cannot distinguish this case from the decision of the House of Lords in *Radley* v. *London and North Western Ry. Co.* (1) by which I am bound. It is said that the chief officer here was negligent; so were the plaintiffs in that case; that his negligence was continuing, so was the negligence of the plaintiffs in that case. They left the trucks that caused the danger where they were and did not move them. Nevertheless, the House of Lords granted a new trial on the ground that, "though the plaintiff may have been guilty of negligence, and although that negligence may, in fact, have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." I think that the defendants in this case in the result, by the exercise of ordinary care and diligence, could have avoided the mischief which happened, and that the plaintiffs were entitled to judgment.

The appeal must be allowed with costs here and below and judgment entered for the plaintiffs for an amount to be ascertained in the mode agreed between the parties.

Appeal allowed.

Solicitors for appellants: *Hill, Dickinson & Co., Liverpool.*
Solicitors for respondents: *Weightman, Pedder & Co., Liverpool.*

(1) 1 App. Cas. 754, 759.

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May 19.

[IN THE COURT OF APPEAL.]

MASLING *v.* MOTOR HIRING COMPANY (MANCHESTER), LIMITED.

[1919 M. 423.]

MANCHESTER DISTRICT REGISTRY.

Practice—Security for Costs—Infant Plaintiff—Action of Tort—Remitted to County Court—Next Friend—Affidavit as to Means—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 66.

By s. 66 of the County Courts Act, 1888, any person against whom an action of tort is brought in the High Court may make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff; and thereupon a judge of the High Court shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the Masters of the Supreme Court, or satisfy a judge of the High Court that he has a cause of action fit to be prosecuted in the High Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy a judge as aforesaid, that the action be remitted for trial before a court to be named in the order.

Where an action of tort is brought by an infant suing by his next friend, an order may be made under this section if the affidavit states either that the infant or that the next friend has no visible means of paying the defendant's costs.

APPEAL from an order of Greer J. in chambers.

The action was for personal injuries. The statement of claim contained the following allegations: "1. The plaintiff is an infant six years old suing by his father as his next friend and resides at 22 Huxley Avenue, Cheetham Hill, Manchester, in the County of Lancaster. 2. On or about November 30, 1918, the plaintiff was lawfully upon a certain public highway called Cheetham Hill Road in Manchester aforesaid and was crossing the roadway thereof having alighted from a tramcar travelling from Cheetham Hill when the defendants' servant so negligently and unskilfully managed and drove a motor car of the said defendants along the said road in the opposite direction that the said motor car was driven into and struck the said plaintiff and knocked him down."

The defendants took out a summons in the Manchester District Registry for an order that unless the plaintiff should give security for the defendants' costs the case should be remitted to the county court under s. 66 of the County Courts Act, 1888. (1)

The affidavit in support of the summons was made by Henry Sydney Rose who was a clerk to the defendants' solicitor and had the conduct of the action on their behalf. It contained the following paragraphs: "3. On March 22, 1919, the plaintiff's solicitor delivered a statement of claim in this action to which I crave leave to refer. . . . . 5. The plaintiff's father, Frederick Edward Masling, has no visible means of paying the costs of the defendants should a verdict not be found for the plaintiff. 6. The said Frederick Edward Masling is a jam boiler and resides in a working-class neighbourhood, namely at 22 Huxley Avenue, Cheetham Hill, Manchester, in a house which according to particulars in the books of the Manchester Overseer is let at an inclusive rent of seven shillings per week, at which address the said Frederick Edward Masling has only resided for about three years. There is a loan search dated November 20, 1916, registered against him at 13 Star Street, Higher Broughton, Salford, in the County of Lancaster. . . . ."

The district registrar made an order that "unless the infant plaintiff do within seven days give security for the defendants' costs in the sum of 75*l.* by payment into court of that amount or bond to the satisfaction of the district registrar, this action

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 66: "It shall be lawful for any person against whom an action of tort is brought in the High Court to make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict be not found for the plaintiff; and thereupon a judge of the High Court shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs to the satisfaction of one of the masters of the Supreme Court, or satisfy a judge of the High Court that he has a cause of action fit to be prosecuted in the High Court, all proceedings in the action shall be stayed, or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy a judge as aforesaid, that the action be remitted for trial before a court to be named in the order. . . . ."

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be remitted for trial to the County Court of Lancashire holden at Manchester pursuant to s. 66 of the County Courts Act, 1888, and that in the meantime or until such security be given all proceedings herein other than proceedings relating to the giving of such security be stayed. . . . ."

The plaintiff appealed from this order to the judge in chambers, and Greer J., the judge in chambers, dismissed the appeal.

The plaintiff appealed.

Merlin for the appellant. There is no power to send this action for trial in the county court except upon evidence that the plaintiff has no visible means of paying the defendant's costs: *Reg.* v. *Judge of the Marylebone County Court.* (1) Here there is no affidavit as to the plaintiff's means. There is an affidavit as to the means of the next friend of the plaintiff; but the next friend is not the plaintiff; and moreover the next friend cannot be made to give security simply on the ground of poverty: *Fellows* v. *Barrett.* (2)

Jowitt for the respondent. The action was remitted in *Green* v. *Dempsey* (3), where the defendant's affidavit showed that the next friend of the plaintiff was without visible means, and in *Marron* v. *Hunter* (4), where the fact was admitted. In *Pender* v. *Leonard* (5) the affidavit stated that the plaintiff had no visible means, and this was held sufficient without a statement that the next friend had no such means. On an appeal by an infant from the county court to the Divisional Court security for costs was ordered in *Swain* v. *Follows* (6) on evidence that the next friend was insolvent. *Wilcox* v. *Wallis Crown Cork and Syphon Co.* (7) is to the same effect. Proof that either the infant or the next friend has no visible means is enough to call for evidence that one or the other has the necessary means. The affidavit in this case by reference to the statement of claim shows that neither the one nor the other has means.

(1) (1883) 50 L. T. 97.
(2) (1836) 1 Keen, 119.
(3) (1870) 5 Ir. L. T. 121.
(4) (1888) 23 Ir. L. T. 2.
(5) [1912] 2 I. R. 144.
(6) (1887) 18 Q. B. D. 585.
(7) [1914] W. N. 107.

Merlin in reply.

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SCRUTTON L.J. This appeal raises a point not yet decided in this Court under s. 66 of the County Courts Act, 1888, which provides that when an action of tort is brought in the High Court by an impecunious plaintiff, the defendant may make an affidavit that the plaintiff has no visible means of paying the costs of the defendant should a verdict not be found for the plaintiff, and thereupon the High Court may make an order that the action be remitted to a county court. The object of the enactment is that the action may be tried cheaply in view of the fact that the defendant, if successful, will probably not recover his costs. If the plaintiff is an infant suing by his next friend what is to happen? Should the affidavit deal with the visible means of the plaintiff or those of the next friend or of both? The present action was brought by a boy of six years old living with his father. It was an action for damages for injury caused by the negligent driving of a motor car by the defendants' servant. The defendants, the owners of the car, took out a summons under s. 66 of the County Courts Act, 1888, in support of which they filed an affidavit stating that the plaintiff's father—i.e., the next friend—had no visible means, lived in a working-class district in a house let at a rent of seven shillings a week, and that he had no visible means of paying the defendant's costs should a verdict not be found for the plaintiff. The point was taken that this affidavit is insufficient in that it states nothing about the visible means of the infant plaintiff. But in spite of that objection the registrar made the order and the judge affirmed the registrar. This is an appeal from the order of the learned judge.

I do not propose to settle a general form of affidavit which will meet all cases be the circumstances what they may. We should regard the substance rather than the letter of this enactment. When the plaintiff is an infant the substantial question is whether the defendant is likely to get his costs if the action is tried in the High Court and the plaintiff fails. It is stated in Daniell's Chancery Practice (1) that: "On

(1) 8th ed. (1914), 100, 101.

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account of an infant's supposed want of discretion, and his inability to bind himself and make himself liable to the costs, he is incapable of bringing an action without the assistance of some other person, who may be responsible to the Court for the propriety of the suit in its institution and progress. Such person is called the next friend of the infant; and if an action is commenced on behalf of an infant without a next friend, the defendant may apply to have it dismissed with costs, to be paid by the solicitor, even though the solicitor was unaware of the infancy. . . . . The next friend is liable to the defendants for the costs of the action, and of all motions and proceedings therein; and if he has been ordered to pay any costs in the action, he will not, in the absence of any reservation in the order directing the payment, be allowed such costs out of the estate." This being the position, if the defendant makes an affidavit that the plaintiff has no visible means of paying the costs of the defendant, that seems to me sufficient. It is then for the plaintiff to answer, if he can, that though he himself has no visible means of paying the costs his next friend has means of paying them. On the other hand, if the defendant makes an affidavit that the plaintiff is an infant suing by his next friend and that the next friend has no visible means of paying the costs, that is sufficient to put the plaintiff to his answer that the combined means of himself and his next friend are sufficient. The English cases establish that the insolvency of the next friend is not sufficient ground for staying all proceedings by an infant, but that where judgment goes against the infant and the next friend, if they wish to appeal the insolvency of the next friend is a ground for stopping the appeal. If the next friend should object that the infant was possessed of means, the Court can find a ready means of securing that the judgment shall be satisfied if the appeal fails. On an appeal from a county court to the Divisional Court an order for security for costs was made in *Swain* v. *Follows* (1), where the next friend of the infant plaintiff was insolvent. There seems to be no reported case where an order has been made in similar circumstances on an appeal to the Court of Appeal,

(1) 18 Q. B. D. 585.

but I can conceive of no reason why an order should not be made. The Irish cases run on the same lines.

This is not a case of stopping an action on account of the poverty of the plaintiff. The action can proceed in the inferior court where the process is less expensive. The effect of s. 66 of the County Courts Act, 1888, is that if the plaintiff prefers the more expensive procedure of the High Court he may invoke it provided that he can pay the defendant's costs in the event of the action failing. The defendant may show that this is not so. In my opinion it is sufficient if the defendant's evidence shows that the plaintiff has no visible means of paying the defendant's costs or that the next friend has no such means. In the present case the plaintiff is six years old; he lives with his father, his next friend, who has no visible means of paying the defendant's costs if the action fails. In substance the case comes within s. 66. To insist on an affidavit that a child of six years old living with an impecunious father has not the necessary means is to look to the letter rather than to the substance of the enactment. The appeal must be dismissed.

ATKIN L.J. It is desirable that the practice should be settled. Therefore I add nothing to what Scrutton L.J has said. In this particular case the defendant's affidavit is sufficient to establish that neither the infant nor the next friend has the necessary means.

Appeal dismissed.

Solicitors for appellant: *Hewitt, Wollacott & Chown, for Shippey, Marley & Doherty, Manchester.*

Solicitor for respondents: *M. A. Jacobs, for H. Finklestone, Manchester.*

W. H. G.

C. A.
1919
April 8, 9, 10; *June* 4.

[IN THE COURT OF APPEAL.]

WILD *v.* SIMPSON.

[1917 W. 1919.]

Solicitor—Bill of Costs—Retainer to conduct Litigation—Subsequent Agreement to receive Portion of Proceeds of Action—Illegality—Right of Solicitor to recover Costs.

The plaintiff, a solicitor, was retained by the defendant to act for him in an action brought against him in the King's Bench Division, in which the claim was admitted, but in which the defendant counterclaimed for a sum of money. During the course of the litigation the defendant was adjudicated bankrupt, and the plaintiff experienced difficulty in getting money for out of pocket expenses. An agreement was then made between the plaintiff and the defendant under which the defendant was to provide all out of pocket expenses in the counterclaim as from that date and fees to counsel; and in the event of the defendant recovering more than sufficient to pay his creditors in full and all legal expenses he was to pay to the plaintiff a certain percentage of the amount recovered; and the plaintiff was to conduct the counterclaim to the end of the action on the above terms, and was not to look to the defendant for any costs of the counterclaim except out of pocket expenses in the event of the defendant being unsuccessful. The defendant was successful in the action. The plaintiff brought an action to recover his costs, contending that he was entitled under his original retainer, notwithstanding the champertous agreement:—

Held, by Bankes and Atkin L.JJ., Duke L.J. dissenting, that, as the original retainer was varied by the subsequent agreement, which was champertous and therefore illegal and under which the plaintiff conducted the subsequent litigation, he was not entitled to recover.

Grell v. *Levy* (1864) 16 C. B. (N. S.) 73, 12 W. R. 378 considered.

Appeal from the judgment of Rowlatt J. at the trial of the action without a jury.

The facts are stated in the judgments. The following statement of facts is taken from the judgment of Bankes L.J. except where otherwise indicated: "The action was brought by a solicitor" by a specially indorsed writ issued on November 15, 1917, "to recover the balance alleged to be due upon twenty-three separate bills of costs. As to a number of these bills of costs the defendant pleaded the Statute of Limitations. To take the case out of the statute the plaintiff relied upon a

payment of 75*l.* which was made to him on November 15, 1911, as being a payment on account of his costs generally. The defendant disputed this contention, and alleged that the payment was in respect of one of the bills of costs only—namely, that relating to an action of *Simpson* v. *Simpson*. In reference to the claim for the amount of the bill of costs in the action of *Simpson* v. *Simpson* the defendant raised two defences. He alleged that upon the true construction of an agreement made between himself and the plaintiff and dated October 23, 1911, the plaintiff had agreed not to make any charge for his services in that action. He further alleged that the plaintiff could only sue upon the agreement of October 23, 1911, for costs alleged to be due in that action, and that, as that agreement was a champertous agreement, the plaintiff could not recover anything. The learned judge decided all these points in the plaintiff's favour.

"The material facts do not appear to be in dispute. In the early part of the year 1908 the defendant's brother brought an action against him" in the King's Bench Division. "The defendant was desirous of counterclaiming for a large amount. He asked the plaintiff to act as his solicitor in the matter. This the plaintiff agreed to do. The defendant was apparently in embarrassed circumstances, and a somewhat unusual arrangement was made to the effect that, in addition to finding out of pocket expenses, the defendant was to pay the plaintiff 2*l.* per week on account of profit costs. There appears to be nothing to justify a conclusion that the original retainer of the plaintiff by the defendant to act as his solicitor in the action of *Simpson* v. *Simpson* was other than a perfectly legitimate and lawful retainer. The plaintiff acted under that retainer, and became the defendant's solicitor on the record. So matters continued down to October, 1911. During this period the defendant had been adjudicated bankrupt (1), and the plaintiff had apparently experienced difficulty in getting any moneys required for out of pocket expenses in connection

(1) The trustee in bankruptcy consented to be added as a party upon provision being made for his costs. The defendant obtained his discharge in 1914.

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with the various matters in which he was acting for the defendant. The defendant appears to have been assisted by some of his friends, included amongst whom was a Mr. Adler.

"On October 23, 1911, the agreement was made in reference to which the main questions in the action arise. The agreement is headed '*Simpson* v. *Simpson*,' and is in the following terms:—'Between George Darlington Simpson and William Wild. Agreed as follows: 1. G. Darlington Simpson to pay 60*l.* on this date generally on account of costs other than the costs of the counterclaim in the above action. 2. G. Darlington Simpson to provide all out of pockets in the above counterclaim as from this date as and when incurred and to provide the agreed fees to counsel. 3. In the event of G. Darlington Simpson recovering more than sufficient to pay his creditors in full and all legal expenses, then G. Darlington Simpson will pay as and when received or paid by John Simpson to Wm. Wild ten per cent. on the first 10,000*l.* and five per cent. on the balance. 4. Wm. Wild agrees to conduct the counterclaim to the end of the action upon the above terms and will not look to G. Darlington Simpson for any costs of the said counterclaim except out of pockets as aforesaid in the event of John Simpson winning the said action. Darlington Simpson. William Wild.'"

The action of *Simpson* v. *Simpson* was tried before Phillimore J., when John Simpson lost the action, the defendant being successful. This decision was reversed in the Court of Appeal, but was restored in the House of Lords. (1)

The facts relating to the defence of the Statute of Limitations are also stated in the judgment of Bankes L.J., but as this defence only raised an issue of fact it is unnecessary to state them here.

Rowlatt J. gave judgment for the plaintiff on all the above points. With regard to the defence of the Statute of Limitations he came to the conclusion that the payment of 75*l.* was in respect of costs generally. With regard to the bill of costs in *Simpson* v. *Simpson*, as to which the question of champerty arose, he held that where there were several promises all

(1) It was stated that the defendant recovered nothing under the judgment.

founded upon a good consideration—namely, the solicitor doing the work—and one of the promises was unlawful, that promise could not be supported, but the other promises remained good; and that therefore the fact that the plaintiff bargained for something which was tainted with champerty, in addition to his lawful costs, did not prevent him from recovering his lawful costs.

The defendant appealed. (1) The arguments are reported only on the question of champerty.

Schwabe K.C. and *Harney* for the defendant. The agreement of October 23, 1911, is champertous, and the plaintiff cannot recover any costs. It is illegal to agree to give a solicitor who is conducting an action a share in the proceeds of the litigation. "Where any part of the consideration for a promise or promises contained in the contract is unlawful, the whole agreement is void, for it is impossible to discriminate between the weight to be given to different parts of the consideration, and the lawful part cannot be severed from that which is unlawful. Where a contract consists of several promises some of which are legal and others illegal, and there is no illegality in the consideration, the promises which are in themselves legal are not contaminated by the illegality of the others and can be enforced, unless the promises are inseparable from and dependent upon one another": Halsbury's Laws of England, vol. vii., pp. 407, 408. In the present case the promise to pay profit costs and the promise to pay 10 per cent. of the proceeds of the litigation are inseparable and dependent on each other, and therefore the whole agreement is bad. A plaintiff cannot sue for breach of contract where part of the promises to be performed by the

(1) The judgment for the plaintiff on the bill of costs in *Simpson* v. *Simpson* was without prejudice to any application the defendant might be advised to make under the Solicitors Act for taxation of the bill on the ground of special circumstances, the judge expressing no opinion whether any special circumstances did or did not exist, or whether an application, if made, ought to succeed. The plaintiff gave notice of cross-appeal, asking to have that part of the judgment from the words "without prejudice" struck out, but, as will be seen, it became unnecessary to determine this point, and the arguments on it are omitted.

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defendant is illegal, even though the consideration on the part of the plaintiff is untainted with illegality: *Bourke* v. *Blake*. (1) See also *Shackell* v. *Rosier* (2), and *Harrington* v. *Victoria Graving Dock Co.* (3) From the time when the agreement was signed the plaintiff became a partner with the defendant in the litigation. The plaintiff undertook to conduct the litigation on terms (inter alia) of receiving part of the proceeds of the litigation. He was embarking on an unlawful adventure, and cannot maintain the action: *Scott* v. *Brown, Doering & Co.* (4); *Josephs* v. *Pebrer* (5); *Allkins* v. *Jupe*. (6) [*Gaskell v. King* (7); *Grell* v. *Levy* (8); and, as regards the divisibility of covenants in restraint of trade, *Price* v. *Green* (9); *William Robinson & Co.* v. *Heuer* (10); were also referred to.]

J. B. Matthews K.C. and *Pritt* for the plaintiff. The mere existence of a champertous agreement does not cause the plaintiff to fail in the action if he is not suing on the illegal agreement. The plaintiff in the present case is suing on the original retainer which was long antecedent to the champertous agreement. He does not rely on the agreement, which the defendant sets up as a defence. He is therefore entitled to succeed: *Grell* v. *Levy* (8); *Hilton* v. *Woods*. (11) The principle is stated by Erle C.J. in *Grell* v. *Levy* (8) where, after stating that the champertous agreement was invalid and illegal, he said: "The agreement being out of the way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs." In that case there was no retainer apart from the champertous agreement. The present case is stronger than that because there was a retainer antecedent to the champertous agreement. The original retainer was never departed from. Moreover, the promises by the defendant were two: one based on the ordinary retainer,

(1) (1857) 7 Ir. C. L. Rep. 348.
(2) (1836) 2 Bing. N. C. 634.
(3) (1878) 3 Q. B. D. 549.
(4) [1892] 2 Q. B. 724.
(5) (1825) 3 B. & C. 639.
(6) (1877) 2 C. P. D. 375.
(7) (1809) 11 East, 165.
(8) 16 C. B. (N. S.) 73, 79.
(9) (1847) 16 M. & W. 346.
(10) [1898] 2 Ch. 451.
(11) (1867) L. R. 4 Eq. 432.

and the other on the illegal agreement. Those promises are divisible, and there is no illegality in the consideration for them—namely, the conduct by the plaintiff of the action. The illegal promise can be cut out and the lawful promise remains standing. The severability of covenants in restraint of trade afford instances of this. See *Mallan* v. *May* (1); *Nicholls* v. *Stretton* (2); *Price* v. *Green* (3); *Pickering* v. *Ilfracombe Ry. Co.* (4); *Baines* v. *Geary* (5); *Baker* v. *Hedgecock.* (6)

Schwabe K.C. in reply.

Cur. adv. vult.

June 4. BANKES L.J. read the following judgment:— [After stating the facts and reading the agreement of October 23, 1911, he continued:] The first question is whether upon the true construction of clauses 3 and 4 of the agreement the plaintiff undertook not to make any charge for profit costs. The substance of the defendant's contention was that the agreement on the plaintiff's part to conduct the counterclaim to the end of the action "upon the above terms" meant that he would conduct it upon the above terms as to remuneration—namely, that in certain events he was to be paid a percentage of the amount recovered, and that such an agreement impliedly negatived the idea that he was to receive any other remuneration. I cannot agree with this contention. Apart altogether from the concluding words of clause 4, I should not have been prepared to accept this construction. These concluding words, however, in my opinion make the matter quite clear. The provision that the plaintiff in the event of John Simpson winning the action was not to receive any costs other than out of pockets appears to me to provide for the event, and for the only event, in which the plaintiff was not to be entitled to his profit costs. As the event did not happen, the defendant, in my opinion, was rightly held by Rowlatt J. to have failed on this point.

The other question in reference to this agreement raises a matter of importance and of difficulty. The agreement is

(1) (1843) 11 M. & W. 653.
(2) (1847) 10 Q. B. 346.
(3) (1847) 16 M. & W. 346.
(4) (1868) L. R. 3 C. P. 235, 250.
(5) (1887) 35 Ch. D. 154.
(6) (1888) 39 Ch. D. 520.

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admitted to be a champertous agreement, and as such it is unenforceable. I am not prepared to accept the view apparently held by Rowlatt J. that the consideration for the agreement of October 23, 1911, was a lawful consideration. There is authority for the proposition that s. 11 of the Attorneys and Solicitors Act, 1870, was inserted for the purpose of providing against champertous agreements with solicitors. See *Jennings* v. *Johnson* (1) and *In re Attorneys and Solicitors Act*, 1870. (2) I cannot regard either the promise of a solicitor to act as solicitor in an action upon champertous terms, or the work done under such a promise, as a good consideration. I think that the language of Brett M.R. in *Herman* v. *Jeuchner* (3) applies to such a case. He lays down the rule in the following words: "When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced." The material question in the present case appears to me to be whether the plaintiff is entitled to recover his costs in *Simpson* v. *Simpson* without any aid from the champertous contract of October 23, 1911. If the plaintiff cannot recover without such aid, he is not, in my opinion, entitled to succeed. The rule has been long established. It will be found in *Simpson* v. *Bloss*. (4) In *Scott* v. *Brown, Doering & Co.* (5) A. L. Smith L.J. lays it down in these words: "If a plaintiff cannot maintain his cause of action without shewing, as part of such cause of action, that he has been guilty of illegality, then the Courts will not assist him in his cause of action." In the present case the plaintiff sues on his original retainer. It is the defendant who sets up the agreement as an answer to the claim. The original retainer still continued after, and in spite of, the agreement of October 23, 1911. I have already stated that, in my opinion, in the events which happened, the plaintiff's right to profit costs under his original retainer was not extinguished by the agreement of October 23, 1911. The original retainer, though still subsisting, may, however, be

(1) (1873) L. R. 8 C. P. 425.
(2) (1875) 1 Ch. D. 573.
(3) (1885) 15 Q. B. D. 561, 563.
(4) (1816) 7 Taunt. 246, 249.
(5) [1892] 2 Q. B. 734.

so varied by that agreement that the plaintiff's cause of action may not be complete without reference to that agreement. It is here, I think, that the plaintiff's difficulty lies. After the making of the agreement it became an essential part of the plaintiff's cause of action that he should negative the event in which he was to get no costs—namely, the event of John Simpson winning the action. See *Coburn* v. *Colledge*. (1) The original retainer is therefore to that extent varied by the subsequent agreement of October 23, 1911, and the plaintiff cannot recover without its aid. For these reasons I consider that the plaintiff's claim, so far as it relates to the costs in *Simpson* v. *Simpson*, is tainted with illegality, and that the plaintiff is not entitled to recover. The case of *Grell* v. *Levy* was much relied upon by the respondent. As reported in 16 C. B. (N. S.) 73 the decision is difficult to understand. A fuller report is to be found in 12 W. R. 378. It is clear from that report that in that particular case, where the client was seeking to compel the solicitor to hand over money received by him in the action, the Court were prepared to assume the existence of a valid retainer, or at any rate to require the client to make good to the solicitor his proper charges for recovering the money. For the reasons I have already given I do not consider that it is possible to make any such assumption in the present case, and the facts do not admit of the introduction of any equitable doctrine which would assist the plaintiff. He must recover on his contract of employment or not at all.

There remains only the question of the Statute of Limitations. The facts in relation to that matter are shortly these. At the time the agreement of October 23, 1911, was made it was also arranged that a Mr. Adler, a friend of the defendant, should provide a sum of 75*l.* for costs in addition to the sum of 60*l.* referred to in the agreement. Two matters seem to me material in connection with this question of the payment of the 75*l.* The first is that Mr. Adler was paying the money for the defendant, and that the question is whether the 75*l.* which Mr. Adler paid on November 15 was, as between

(1) [1897] 1 Q. B. 702, 707

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the plaintiff and the defendant, a payment on account of costs generally, or on account of costs in *Simpson* v. *Simpson*. The second is that by the terms of the agreement of October 23, 1911, it would be quite uncertain for a very considerable time whether the plaintiff would be entitled to any costs in *Simpson* v. *Simpson*. Bearing these considerations in mind I agree with the conclusion arrived at by Rowlatt J. that, as between the plaintiff and the defendant, the payment should be treated as a payment on account of costs generally. Having regard to the decision of this Court in reference to the costs in *Simpson* v. *Simpson* it is not necessary to express any opinion on the cross-notice of appeal.

The result is that the appeal succeeds so far as the claim relates to the costs in *Simpson* v. *Simpson*, and that the judgment, so far as it relates to those costs, must be set aside. The rest of the judgment for the plaintiff to stand, but the defendant to have the costs of the issue relating to the bill of costs in *Simpson* v. *Simpson*. There will be no costs of the cross-appeal, but the appellant will get the costs of his appeal. Liberty to apply as to the form of the judgment and as to costs of action after taxation of the bills of costs in respect of which the plaintiff recovers judgment. No enforcement of the order of the costs of the appeal until after liberty to apply disposed of.

DUKE L.J. read the following judgment:—The plaintiff brought his action to recover moneys which he alleged to be due to him for work done and moneys paid by him under the defendant's retainer of him as a solicitor. As to some bills of costs of small amount the defendant relied upon a plea of the Statute of Limitations (21 Jac. 1, c. 16). As to bills amounting in all to upwards of 2900*l.* he set up an agreement made between the parties on October 23, 1911, upon which he founded two contentions: the one that it precluded any claim except for out of pocket expenses and counsel's fees which had been paid; the other that the agreement was champertous, and that this rendered the plaintiff's services in the action unlawful, and disentitled him to any remuneration.

In answer to the defendant's plea of the Statute of Limitations the plaintiff alleged a payment on account made within six years of the commencement of the action. In the opinion of the learned judge at the trial he made good this allegation. I agree with the view of the learned judge.

The learned judge held further that upon the true construction of the agreement of October 23, 1911, it was not an agreement to do the work in question for out of pocket expenses and counsel's fees. Clause 3 of the agreement recognizes that if the defendant were to succeed in the proceedings in question he would have legal expenses to pay, and that these would include legal expenses not necessarily recoverable from his antagonist. The provision in clause 4, that in case the defendant fails the plaintiff will not look to him for any costs beyond out of pockets, seems to me to mean that if the defendant succeeds he will pay the plaintiff's costs. Incidentally it has the effect also of affirming inferentially the continuance of the relation of solicitor and client under the retainer of 1908. I think with the learned judge that the document contains no agreement limiting the plaintiff's claim in the events that have happened to his out of pocket expenses and counsel's fees. The main topic of discussion before us, however, was the effect upon the relations of the parties as solicitor and client of the bargain in the agreement for a share of the proceeds of the litigation. That bargain was clearly champertous and illegal, and the defendant contended that it rendered the whole services of the plaintiff a series of illegal acts. If this contention is well founded the consideration moving from the plaintiff was bad in law, and the character of the several promises of the defendant and the question of their divisibility would become immaterial.

The relevant facts in the case can be concisely stated. In March, 1908, the defendant was being sued by his brother in an action of *Simpson* v. *Simpson* upon a money claim which he admitted. The defendant had valid claims against his brother of very large amount, which were made the subject of a counterclaim and were ultimately established upon appeal to the House of Lords. On March 16, 1908, the

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plaintiff became the defendant's solicitor on the record. He so remained at all material times. The defendant was made bankrupt during the proceedings, but his trustee in bankruptcy became a party to the litigation, and moneys on account of costs were provided by other persons. In October, 1911, the counterclaim was ready for trial. The defendant was indebted to the plaintiff as solicitor on various accounts, and was unable to pay the costs already due, or to provide for his accruing costs in the ordinary course. In these circumstances the agreement of October 23 was made, with provision in it for certain cash payments, and the bargain for remuneration which is now in question. The effect in law of the material parts of the agreement seems to me to have been this: In consideration that the plaintiff would continue his services as solicitor and in case of the failure of the counterclaim would charge the defendant no more than disbursements, the defendant would provide out of pockets and counsel's fees as the litigation proceeded, and in the event of success would pay to the plaintiff his costs to be taxed and 10 per cent. of any proceeds of the counterclaim in excess of a certain amount. It is the last-mentioned promise which is said to convert the employment into an illegal service.

I am of opinion that the retainer of the plaintiff by the defendant made in 1908 was not determined by the agreement made in 1911, and that it was of full effect at all material times. The new agreement modified the terms of remuneration, but did not alter the obligations of service. These remained what they had always been. The solicitor was not newly employed. He consented to continue his services. The question, as I see it, is whether the new agreement so operated as to convert the old relationship of solicitor and client into an illegal relationship, and if it did not whether the defendant's several promises of remuneration are so interdependent that no valid claim can be made upon either of them. The defendant, in order to succeed in the action, must show, to quote the words of Lord Mansfield in *Holman* v. *Johnson* (1), that the plaintiff's cause of action arises "ex

(1) (1775) 1 Cowp. 341, 343.

turpi causa or the transgression of a positive law of this country." It did so arise if the series of acts in respect of which the plaintiff claims his costs were acts of illegal maintenance. To make out this illegality it is necessary that the defendant should establish the existence of a rule of law whereby a champertous bargain between solicitor and client converts the retainer of a solicitor into an unlawful agreement, such, for example, as would exist where litigation was being knowingly carried on to effect a fraud. The argument for the defendant, as applied to such a case as the present, seems to me to take too little account of the exceptional position of legal practitioners under the common law in respect of the maintenance of actions not in themselves unlawful. What has first to be remembered is that maintenance of a lawful action by an attorney for reward was not within the prohibition of the common law. In *Smith* v. *Andrews* (1) Rolle C.J. speaks of the maintenance of actions at law by an attorney for reward in these words: "This is a special maintenance, for it is in the case of an attorney, and therefore lawfull." Lord Coke's exposition of the law of maintenance in 2 Inst. 212, 564, is to the same effect. Some light is thrown upon the matter also by the various arguments which took place in the Court of Common Pleas in 1672 in an action of *Pierson* v. *Hughes*. (2) The status of an attorney at the time of the passing of the general statute against champerty (Articuli Super Chartas) appears in a plea set forth by Coke in 2 Inst. 562. The statute deals specifically with the case of the legal practitioner on the footing that maintenance by him of actions at law for reward was lawful. What has to be determined here is whether the common law right or privilege is destroyed by any infringement by the practitioner of the provisions of the statutes against champerty. The terms of the statute Articuli Super Chartas are relevant to the discussion: "No officer nor any other (for to have part of the thing in plea) shall not take upon him the business that is in suit. . . . . But it may not be understood hereby, that any

(1) (1649) Sty. 183.

(2) (1672) Freem. K. B. 71, 81; S. C. 3 Keeble, 140, 153, sub. nom. *Parson* or *Perce* v. *Hume*.

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person shall be prohibit to have counsel of pleaders, or of learned men in the law for his fee"—counsaile des countours, et des sages gents pur son donant—" or of his parents and next friends." The statute does not contain in express terms, and I think it does not imply, the rule of law which is asserted by the appellant in this appeal. Lord Coke's commentary upon the statute deduces from its terms the principle that the attorney may have no pecuniary interest in the litigation beyond his fee, but does not suggest the existence of the rule now contended for; and I have not been able to find any authority for the contention. Such decisions as I know of seem to me to have a contrary effect.

There is a series of cases in courts of equity, commencing with *Skapholme* v. *Hart* (1) in 1680, in which the rights of the parties had to be determined as between solicitor and client when the solicitor had acquired property of the client which was the subject of litigation under agreements alleged to be champertous: *Strachan* v. *Brander* (2) before Lord Northington in 1759; *Turwin* v. *Gibson* (3) before Lord Hardwicke in 1749, and *Wood* v. *Downes* (4) before Lord Eldon in 1811, are instances. In each case the transaction was held to be champertous and was set aside, but upon payment of the solicitor's costs. The decree in the last-mentioned case concludes with directions for delivery and taxation of the solicitor's bill for moneys paid and for his fees and disbursements as solicitor, and an order (so far as is here material) for reconveyance upon payment of what shall be found due. *Grell* v. *Levy* (5) was decided in the Court of Common Pleas in 1864, when the Court consisted of Erle C.J. and Williams, Willes and Keating JJ. The plaintiff sought to recover from his solicitor moneys which had been recovered and retained under a champertous agreement. The plaintiff recovered judgment for the sum in question less the amount of the solicitor's proper costs. The ground of the decision was stated by Erle C.J. to be that the agreement was void, and the learned judge said that "the agreement being out of the

(1) (1680) Ca. temp. Finch, 477.
(2) (1759) 1 Eden, 303.
(3) (1749) 3 Atk. 720.
(4) (1811) 18 Ves. 120.
(5) 16 C. B. (N. S.) 73, 79.

way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs." It has been suggested that in the cases in equity and perhaps in *Grell* v. *Levy* (1) the various plaintiffs were required to "do equity" as a condition of obtaining relief of an equitable nature. I cannot see, however, that there could have been a right on the part of the solicitor in any of these cases to recover anything for costs if his employment was illegal in its nature; and if the rule exists for which the present appellant contends it seems to me incredible that it should have been overlooked by the very eminent judges who took part in the decision of the Court of Common Pleas in *Grell* v. *Levy*. (1) I think there was no such rule before the Solicitors Act, 1870, and that s. 11 of that Act does not alter the law. Once it is established that the services of the plaintiff constituted a good consideration in law to support a promise of remuneration not in itself unlawful, the questions which remain are whether the plaintiff can sue on his original retainer, or on the new agreement notwithstanding the champertous nature of one of the promises it contains; and assuming he can sue, whether the defendant's promises are severable. For reasons I have already stated I think the plaintiff could sue on the original retainer. I am of opinion also that he does not require any aid from the illegal agreement in order to establish his case, and that, no matter who brings that agreement to the notice of the Court, the defendant's promise to pay costs under his retainer and his promise to pay a champertous remuneration are distinct engagements, one of which is legal and can be enforced: *Pigot's Case* (2); *Pickering* v. *Ilfracombe Ry. Co.* (3)

To what penalties the plaintiff has exposed himself by being party to a champertous bargain is not matter for decision here. He is entitled, in my view of the case, to retain the judgment given in his favour in the Court below, and I think the defendant's appeal should be dismissed with costs.

The plaintiff appeals against that part of the judgment of

(1) 16 C. B. (N. S.) 73, 79. (2) (1614) 11 Rep. 26*b*.
(3) L. R. 3 C. P. 235.

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the learned judge which directed that the judgment entered for the plaintiff should be without prejudice to any application of the defendant for taxation of the plaintiff's bill on the ground of special circumstances. I cannot accept the argument advanced on the part of the plaintiff that a judge sitting at nisi prius has no jurisdiction to make such an order. But there was not in fact any application before the Court either under the Solicitors Act or under the general jurisdiction over solicitors, nor had the parties dealt by relevant evidence with the questions which arise on such applications. The learned judge did not stay execution on the judgment pending any further proceeding of the defendant, nor do I think he could have done so in the circumstances. The plaintiff was properly held to be entitled in the action to enter final judgment against the defendant, and I think his right was to have liberty to enter judgment simply and without qualification. I think, therefore, that the words complained of, which have no specific or definite operation on the relative rights of the parties, should be struck out. There should be no costs of the cross-appeal.

ATKIN L.J. read the following judgment:—The plaintiff's claim upon the bill of costs in the action of *Simpson* v. *Simpson* is met by the defence that the plaintiff was employed as the defendant's solicitor upon the terms of a special contract in writing dated October 23, 1911; that such contract was champertous and therefore illegal; and that by reason thereof the plaintiff cannot recover. The learned judge took the view that the illegality was severable, and that the plaintiff might recover on the promises which were not tainted with champerty. It is further contended that, even if the whole agreement is void for illegality, the plaintiff can treat it as a nullity, and sue upon the original retainer given some years before.

These contentions require an examination of the facts. In or about January, 1908, John Simpson, the brother of the defendant, commenced an action against him upon a money claim. The plaintiff did not at first act for the defendant in

the action, but in March, 1908, agreed to act for the defendant, and his name appeared on the record as the defendant's solicitor. In the action the defendant counterclaimed for a large sum on the ground of the wrongful dealings by John Simpson with the defendant's property. The terms of the original retainer of the plaintiff at the end of February, 1908, as deposed to by him, were that the defendant was to find him out of pocket expenses and 2*l.* a week towards profit costs. In January, 1910, the defendant was adjudicated bankrupt on a petition by his brother John. I am not clear whether the counterclaim had already been delivered in the action, but in any case the defendant's trustee in bankruptcy was added as a party consenting to be joined upon provision being made for his costs. It is unnecessary to consider whether the bankruptcy of the client would under the circumstances have entitled the solicitor to treat the retainer as determined, for it is plain that in fact he continued to act. The fact that the defendant at all material times was an undischarged bankrupt is of some importance. It had some effect upon the plaintiff's mind, for on January 24, 1910, he made a suggestion in writing to the defendant that he should be employed in the future in the action upon the terms that he should be paid out of pocket expenses and in addition 10 per cent. on the amount recovered from the plaintiff as soon as it appeared that the sum recovered exceeded the claims of the creditors in the bankruptcy. To these terms the defendant refused to accede, alleging that they were illegal, but rather I think on the ground that they might offend against the bankruptcy law than on the ground of champerty. The action proceeded slowly, and concurrently with its progress occur repeated demands from the present plaintiff to be secured as to his costs. By October, 1911, the case appears to have been in a position when the solicitor and the client had to come to a definite understanding as to ways and means. Large out of pockets had to be found, for counsel had to be briefed; the client was a bankrupt, though possessing friends who were able and willing to render some assistance. The solicitor under the general law relating to a retainer in a

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common law action was under an obligation to act until the determination of the case, but only on condition that the client provided the necessary out of pocket expenses. On October 3, 1911, the solicitor writes to his client as follows: "I am sorry to hear you are unwell and gone to Cornwall without coming to any arrangement with me respecting this action"—the action of John Simpson—"because it seems to me the present position of affairs is very serious. My requirements are payment of Mrs. Simpson's costs 5*l.* Hamilton Petition (attendances) 25*l.* the present out of pocket expenses; security for 300*l.* in respect of costs other than J. S. action, and as regards this I am prepared to accept a sporting offer. The action is practically in the same position as it was at the commencement of the long vacation, and as I told you nearly two months ago there it will remain until my very modest demands are complied with. I am in the cart to close upon 1,000*l.* holding as security a few Malang shares which stand at about 9*d.* in the market, and I hear there is going to be trouble about this company for misrepresentations in the prospectus. I suppose it must be your charming personality that has induced me to stray from the strict paths of business, and treat you as I have never done any client before. However it is all finished now so far as I am concerned. The future rests with you." He then proceeds to deal with the steps that have to be taken with regard to the case being got ready for trial, and then he goes on to say: "If you are not going on with this case I ought to let Adler know, as he is your surety, and I must inform Fairbarn as he is the main defendant in the action and is entitled to an opportunity of continuing the action himself, although I do not for a moment think he will do so. If you intend to fight any further, I think I should return to town at once and commence work." To that the defendant replied on October 9: "It is no good beating about the bush or fancying what you have seen or know. I cannot meet the terms you have mentioned, so if you hold the pistol at my head at this grave crisis you must fire." The answer is terse and clear. At this stage it appears to me that the solicitor is saying:—I am not going to continue this action

until I can see that the money will be provided for the necessary costs; but he intimates that he is prepared to make special terms as to this action, provided that he receives some payments on account in respect of other matters. The defendant's letter in reply is a non possumus. The solicitor was, I think, at this stage under the circumstances entitled to refuse to continue the action, and at any rate there was a bona fide claim to be entitled so to refuse. Moreover, in order to determine whether the parties intended to make a new contract on fresh consideration one has to disregard the question of illegality; and the agreement on both sides to vary the original terms of the retainer would in itself form sufficient consideration to support the mutual promises. For these reasons I conclude that a new contract of retainer was made for which, if otherwise legal, there was ample consideration, and that the new contract superseded the old. Part of the terms of the new contract at any rate is contained in the document dated October 23, 1911, signed by both parties and relied on by the defendant. I say part, for it would appear from documents of about the same date that there was a further arrangement for other sums to be found by friends of the defendant towards general costs other than those in the action of *Simpson* v. *Simpson*. In accordance with the bargain so made Mr. Adler apparently on the same day sent to the plaintiff the cheque for 60*l*. stipulated for in the first paragraph of the agreement. I think that there can be no doubt that both parties for the future considered themselves bound by it. I need only refer to the plaintiff's letter of November 4, 1911, in which he asked for a cheque for certain out of pockets "according to our bargain." A question has arisen on the construction of the agreement as to whether the percentage mentioned in clause 3 was to be in addition to profit costs or not. I have great difficulty in construing the clause, but on this point, in view of the reference to the defendant recovering sufficient to pay his creditors in full "and all legal expenses," I think the true view is that the percentage was to be in addition to the ordinary profit costs. Had the agreement been otherwise the defendant would not

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have been entitled to tax his costs against his brother John Simpson in the action, as apparently he did through the present plaintiff.

One has now to consider the effect of the agreement that, in the event of the defendant being successful, the defendant in the event named would pay to the plaintiff 10 per cent. on the first 10,000*l.*, and 5 per cent. on the balance. It is not disputed before us that this stipulation was void for champerty. It was however contended that the consideration, namely, the performance by the plaintiff of the duties of a solicitor in conducting the action, was lawful; and that, the promises being severable, the illegal and champertous part can be eliminated, leaving the defendant liable to pay the ordinary profit costs. This view has commended itself to the learned judge. I am, however, unable to agree with him. Champerty is illegal and an indictable offence. It is a form of maintenance. "Champerty is but a species of maintenance which is the genus": 2 Co. Inst. 208. "An action of maintenance did lie at the common law, and if maintenance in genere was against the common law, a fortiori champerty, for that of all maintenances is the worst": 2 Co. Inst. 208. The definition by Coke is "to maintaine to have part of the land, or anything out of the land, or part of the debt, or other thing in plea or suit; and this is called cambipartia, champertie": Co. Litt. 368*b*. It is maintenance aggravated by an agreement to have a part of the thing in dispute. Maintenance is the unlawful intermeddling with litigation in which one has no concern. *Per* Lord Finlay L.C. in *Neville* v. *London Express Newspaper, Ld.* (1) I think the reason for the rule which is clearly in existence, that an agreement by a solicitor to purchase part of the proceeds of the suit in which he is acting as a solicitor is void for champerty, is based upon the consideration of the above definitions. Obviously no one intermeddles more with litigation than the solicitor for one of the parties. As long as he confines himself to lawful terms of remuneration he has a lawful concern in the litigation. If however he is acting, not on ordinary professional terms, but has a direct

(1) [1919] A. C. 368, 382.

interest to receive part of the proceeds of the litigation, he has altered his position and is deemed to be an unlawful intermeddler. The cases of champertous agreements by solicitors are often regarded merely as concerning the immediate client. Advantage may be taken of him, and oppressive terms exacted by a legal adviser who is in a commanding position by reason of his special knowledge. But the offence of maintenance, apart from the interest of the public generally, is directed primarily, not at the client maintained, but at the other party to the litigation. He has the right to be free from litigation conducted by the assistance of persons working for their own interests, and not in order to give lawful professional aid to the opposing litigant. A champertous agreement between solicitor and client is void therefore, not merely because of an abuse of the confidential relationship between solicitor and client, but because the agreement involves a continuing wrong, namely, the maintenance of the litigation against the opposing party. If this view is correct, it appears to me that it follows that in conducting a litigation under such an agreement as this the solicitor is performing an illegal act, or rather a series of illegal acts, and cannot recover remuneration for such acts though performed at his client's request. In other words the consideration is illegal. But in fact it matters not whether the consideration is illegal. The purpose of the contract is illegal, namely, the champertous maintenance of the litigation, and for services rendered to effectuate an illegal purpose no one in our courts can recover remuneration. It is said that if maintenance and champetry are illegal in this sense, the proceedings in the litigation would be void. That they are not is clear. It is hardly necessary to cite authority, for it is undisputed that the measure of damages in an action for maintenance includes the costs which the plaintiff has incurred in the maintained action, and upon the decision in *Neville* v. *London Express Newspaper, Ld.* (1), he cannot recover those costs unless the action has been decided in his favour. This assumes that the litigation between the parties, though maintained on the one side, results in

(1) [1919] A. C. 368.

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an effective and valid determination of rights. I can see no difficulty in this. The proceedings ex hypothesi are being maintained against an innocent party. They may result in advantage to him; in any case they are proceedings which involve the exercise by the Court of its judicial authority. To set the procedure of the Court in motion for a particular object may be unlawful; but the proceedings themselves remain valid. They vitally concern two parties at least not privy to the illegality—namely, the opposing litigant and the Court itself. I should not expect therefore to find the proceedings, though unlawfully maintained, to be declared void; though I reserve my opinion as to whether the Court, on being satisfied that pending proceedings are being unlawfully maintained, has not power to stay them as being vexatious and oppressive and an abuse of the process of the Court, and to continue such stay until the Court is satisfied that the proceedings are purged of the taint of illegality.

It is necessary to deal with the case of *Grell* v. *Levy* (1), which was strongly relied on by the plaintiff. There an attorney had been given in France a written retainer to recover a debt in England. His sole remuneration was to be a half share of the amount recovered. He conducted the necessary litigation in England, and recovered from the defendant for the plaintiffs 500*l*. for debt and 170*l*. for costs. He subsequently paid over to the plaintiffs 300*l*. retaining for himself 200*l*. and the costs. This was the result of a subsequent agreement made between himself and the plaintiffs which the jury at the trial found to have been induced by the fraud of the defendant. See 12 W. R. at p. 379. The plaintiffs claimed from the defendant the balance of the sum received by him, i.e., 370*l*. Verdict was entered at the trial for the defendant subject to leave to the plaintiff to move for judgment non obstante veredicto. Counsel for the plaintiffs obtained a rule to enter the judgment for them for alternative sums set out at p. 76 of the report in 16 C. B. (N.S.) On the hearing the Court found that the agreement was illegal, and gave judgment for

(1) 16 C. B. (N. S.) 73.

plaintiffs for the balance of 370*l.* less 210*l.*, which consisted of 170*l.* costs as between party and party and 40*l.* costs as between solicitor and client. On the hearing of the rule there appears to have been no argument as to whether the deduction should be allowed or not. The decision may be supported on the ground that the plaintiffs were the actors in the litigation; they were seeking in an action for money had and received to claim the proceeds of work done by the defendant, and the Court may well have held that the plaintiffs could not approbate the acts of their agent the solicitor without compensating him for the services which procured for them the proceeds they claimed in the action. This explanation, I think, covers all the cases cited where (generally it must be said without discussion) courts of equity have allowed defendants in account their costs in relation to champertous proceedings. But in *Grell* v. *Levy* (1) Erle C.J., after finding the agreement to be illegal, says: "The agreement being out of the way, the defendant is remitted to his ordinary rights upon his retainer as attorney for the plaintiffs." The only retainer suggested in the report is the agreement which confines the solicitor's remuneration expressly to a share of the amount recovered. The view of the learned Chief Justice seems to me, with all respect, contrary to principle, and if the case is an authority for the proposition that a person employed on an express contract to do work for a remuneration that is illegal can, where the special contract fails for illegality, recover upon a quantum meruit, I think it is wrong and should be overruled. The result would be to make the law of champerty as between solicitor and client of very little effect. A solicitor would only have to bargain to receive the champertous sum in addition to his ordinary costs. He would never be in a worse position financially for the illegality. He could always recover as much as an innocent solicitor, and would take his chance of also recovering the fruits of the wrongdoing.

In my opinion, as the common law retainer is admittedly a retainer for the complete action, the solicitor in this case cannot recover any remuneration. Up to the date of the

(1) 16 C. B. (N. S.) 79.

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illegal agreement his services are not complete, and if he is prevented by his own act in making an illegal agreement from completing the services lawfully, I see no ground upon which he can sue on a quantum meruit. If a cab is engaged to drive to a particular destination, and halfway the driver is informed by his fare that he is proceeding thither to execute a burglary, and the driver proceeds, can he recover the fare or half of it? I think not. The controversy in this case appears to me to be determined by the answer to the question whether champerty is a form of maintenance or not. It appears to me that there is a range of authority from Sir Edward Coke to Lord Finlay which answers this in the affirmative. In the event the objection in this, as in most cases of illegality, may sound very ill in the mouth of the defendant. But, as Lord Mansfield said in *Holman* v. *Johnson* (1): "It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: ex dolo malo non oritur actio. . . . . It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

The result is in my judgment that the plaintiff fails upon his bill of costs in *Simpson* v. *Simpson*. I agree with the judgment of Bankes L.J. on the other parts of the case and with the order stated by him.

Appeal allowed in part.

Solicitors for plaintiff: *Wild & Co.*
Solicitors for defendant: *Jackson, Elwell, & Curran.*

(1) 1 Cowp. 343.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1919
June 2, 6.

ELLINGSEN AND ANOTHER *v.* DET SKANDINAVISKE COMPANI AND OTHERS.

[1917 E. 647.]

Practice—Costs—Two Defendants jointly represented—Judgment for One and against the Other—Plaintiff liable for Half the Costs of the Defence.

In an action against two companies judgment was given against one company with costs and for the other with costs. One firm of solicitors represented both the companies. The successful company had agreed to pay the solicitors their costs incurred on behalf of the other company. On taxation of the costs of the action :—

Held, that the successful company was entitled to only one-half of the items incurred for the benefit of both defendants.

In re Colquhoun (1854) 5 D. M. & G. 35 ; *Beaumont* v. *Senior* [1903] 1 K. B. 282 followed.

APPEAL from the decision of Bailhache J. affirming a taxing Master upon a review of taxation.

The facts and arguments sufficiently appear from the written judgment of the Court.

Jowitt for the appellant.

Stuart Bevan K.C. for the respondent.

Cur. adv. vult.

June 6. The judgment of the Court (Bankes, Scrutton and Atkin L.JJ.) was prepared by Scrutton L.J. and read by

ATKIN L.J. This is an appeal from a decision of Bailhache J. disallowing objections taken by the defendants Harsem & Co., Ld., to a taxation of costs awarded to them, and upholding the taxing Master's answers to objections. The facts are somewhat unusual.

The plaintiffs, Ellingsen & Co., sued a Scandinavian company and Harsem & Co., Ld., on a dispute in relation to a timber contract. The claim alleged that the Scandinavian company were principals and had broken the contract, or, in the alternative, that Harsem & Co. were principals and had broken the contract, or, alternatively, had warranted they had

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authority as agents to make the contract and had broken their warranty. The action was tried by Bailhache J., who gave judgment against the Scandinavian company with costs, and for Harsem & Co. with costs. He was asked to award Harsem & Co. only an increase in the costs of the action occasioned by their successful defence and, I suppose, the claim against them, but refused. Harsem & Co.'s claim for costs then went to taxation. The same solicitors had appeared for Harsem & Co. and the Scandinavian company, and they presented a bill, as I gather, claiming the whole amount of certain items which would be incurred for the benefit of both defendants. Term fees were given as an example; I suppose attendances in court by the solicitor would be another; and the copy of documents common to both briefs. The taxing Master disallowed this claim for the whole of each item so incurred and allowed Harsem & Co. the whole of their costs incurred exclusively on their own behalf, but only half of the costs incurred on behalf of themselves and their co-defendants. Harsem & Co. brought in objections; the taxing Master disallowed them; on appeal Bailhache J., who had tried the case, affirmed the disallowance, and Harsem & Co. appealed to this Court.

In view of certain authorities, the Court remitted the matter to the taxing Master to report what the nature of the retainer was. He reported that originally Harsem & Co. retained the solicitors to act for them, Harsem & Co., only; that at a later stage the solicitors received instructions through Harsem & Co. to act for the Scandinavian company and made a separate agreement with Harsem & Co. by which Harsem & Co. undertook to pay costs incurred on behalf of the Scandinavian company. The circumstances under which Harsem & Co. instructed a solicitor to appear for the Scandinavian company were not gone into, but the Master finds that the company, through their agents Harsem & Co., instructed the solicitors to act for them, and does not make any finding as to any agreement between the Scandinavian company and Harsem & Co. as to who should bear the costs.

These findings appear to amount to findings of two separate

retainers by Harsem & Co. and the Scandinavian company, and on these facts it appears clear on the authorities that each is only liable to the solicitors for half the cost of the joint items of defence, and the whole of any separate items of defence.

Kelly C.B. in *Burridge* v. *Bellew* (1) states that there is no difference between the practice in Chancery and at common law. If there has been a joint contract between the solicitor and his clients, each client is liable for the whole costs; and if there were separate contracts, each will be liable for his own portion of them; and as pointed out by Amphlett B. in the same case (2), the fact that after separate retainers the defence is conducted jointly does not make the liability joint. As the principle of allowance of costs is that the successful party is to be recompensed the liability he has reasonably incurred in defending himself, if he is only liable to his solicitor for half of certain joint items he cannot be allowed the whole of them, even though by some separate agreement he has made himself liable for the other half, primarily the liability of another and unsuccessful defendant. This appears to be in accordance with the reasoning of the decision in *Beaumont* v. *Senior*. (3) There an action was brought against S. and B. represented by the same solicitor. S. failed in his defence, B. succeeded. On B.'s bringing in his bill of costs, the registrar gave the plaintiff the general costs of the action against S. and gave B. only the extra costs occasioned by his being joined as a defendant. B. appealed, asking not for his general costs but for half the costs of the defence; the county court judge affirmed the registrar. In the Divisional Court the plaintiff did not uphold the registrar, but said that the relations of B. and S. were such that it was probable B. was not liable for costs at all, S. being the only person liable. The Divisional Court sent the matter back to the registrar to ascertain whether B. was under any liability for the costs of the defence, and said that if there was no agreement between the two defendants as to how the costs of defence should be borne, it was clear that each defendant was only liable for half the costs of the defence,

(1) (1875) 32 L. T. 807, 812. (2) Ibid. 813, 814.
(3) [1903] 1 K. B. 282.

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and that B. could only recover half the costs. The Court must have meant an agreement to which the solicitor was a party, freeing B. from any liability for costs. An instruction by or on behalf of B. to appear for him would, on the face of it, make him liable to the solicitor for costs. This judgment purports to be based on the decision of the Lords Justices in *In re Colquhoun* (1), which in its turn is based on the elaborate certificate of Master Follett on the well-established practice of taxation, which the Lords Justices say may be open to some objections, but is too well established to be disturbed by decisions. The certificate states the practice between party and party thus (head 3) (2): "If one solicitor appears for three defendants, and the bill is dismissed with costs as to one of them, the plaintiff can only be compelled to pay the costs of such proceedings as exclusively relate to that defendant, and one-third of the costs of the proceedings taken jointly for all three defendants." Common law decisions are cited which support this statement. In *Griffiths* v. *Jones* (3) two of three defendants who appeared by the same solicitor succeeded in an action and were allowed by the Court "their aliquot proportion of the full costs incurred on the joint retainer." In *Starling* v. *Cozens* (4) three out of four defendants appearing by the same solicitor succeeded, and Parke B. on the assumption that they all employed the solicitor said each of them was entitled to one-fourth of the costs of defence. The taxing Master in the present case based his decision on *In re Colquhoun* (1) and *Beaumont* v. *Senior* (5), which he appears to have applied correctly to the present facts. While the principle involved may perhaps in some cases have curious results, it appears to be too well established to be disturbed by decisions of this Court.

In our opinion the appeal should be dismissed with costs.

Appeal dismissed.

Solicitors for appellants: *Trinder, Capron & Co.*

Solicitors for respondents: *Stibbard, Gibson & Co.*

(1) 5 D. M. & G. 35.
(2) Ibid. 37.
(3) (1835) 2 C. M. & R. 333, 334.
(4) (1835) 2 C. M. & R. 445.
(5) [1903] 1 K. B. 282.

W. H. G.

[IN THE COURT OF APPEAL.]

C. A.
1919
June 24, 25.

BALFOUR *v.* BALFOUR.

Husband and Wife—Contract—Temporary Separation—Allowance for Maintenance of Wife—Domestic Arrangement—No resulting Contract.

The plaintiff sued the defendant (her husband) for money due under an alleged verbal agreement, whereby he undertook to allow her 30*l.* a month in consideration of her agreeing to support herself without calling upon him for any further maintenance. The parties were married in 1900. The husband was resident in Ceylon, where he held a Government appointment. The plaintiff accompanied him to Ceylon, but in 1915 they returned to England, he being on leave. In 1916 he went back to Ceylon, leaving her in England, where she had to remain temporarily under medical advice. The plaintiff alleged that the defendant before returning to Ceylon entered into the above agreement. The parties remaining apart, the plaintiff subsequently obtained a decree nisi for restitution of conjugal rights, and an order for alimony:—

Held, that the alleged agreement did not constitute a legal contract, but was only an ordinary domestic arrangement which could not be sued upon. Mutual promises made in the ordinary domestic relationship of husband and wife do not of necessity give cause for action on a contract.

Decision of Sargant J. reversed.

APPEAL from a decision of Sargant J., sitting as an additional judge of the King's Bench Division.

The plaintiff sued the defendant (her husband) for money which she claimed to be due in respect of an agreed allowance of 30*l.* a month. The alleged agreement was entered into under the following circumstances. The parties were married in August, 1900. The husband, a civil engineer, had a post under the Government of Ceylon as Director of Irrigation, and after the marriage he and his wife went to Ceylon, and lived there together until the year 1915, except that in 1906 they paid a short visit to this country, and in 1908 the wife came to England in order to undergo an operation, after which she returned to Ceylon. In November, 1915, she came to this country with her husband, who was on leave. They remained in England until August, 1916, when the husband's leave was up and he had to return. The wife however on the doctor's advice remained in England. On

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August 8, 1916, the husband being about to sail, the alleged parol agreement sued upon was made. The plaintiff, as appeared from the judge's note, gave the following evidence of what took place: "In August, 1916, defendant's leave was up. I was suffering from rheumatic arthritis. The doctor advised my staying in England for some months, not to go out till November 4. On August 8 my husband sailed. He gave me a cheque from 8th to 31st for 24*l.*, and promised to give me 30*l.* per month till I returned." Later on she said: "My husband and I wrote the figures together on August 8; 34*l.* shown. Afterwards he said 30*l.*" In cross-examination she said that they had not agreed to live apart until subsequent differences arose between them, and that the agreement of August, 1916, was one which might be made by a couple in amity. Her husband in consultation with her assessed her needs, and said he would send 30*l.* per month for her maintenance. She further said that she then understood that the defendant would be returning to England in a few months, but that he afterwards wrote to her suggesting that they had better remain apart. In March, 1918, she commenced proceedings for restitution of conjugal rights, and on July 30 she obtained a decree nisi. On December 16, 1918, she obtained an order for alimony.

Sargant J. held that the husband was under an obligation to support his wife, and the parties had contracted that the extent of that obligation should be defined in terms of so much a month. The consent of the wife to that arrangement was a sufficient consideration to constitute a contract which could be sued upon.

He accordingly gave judgment for the plaintiff.

The husband appealed.

Barrington-Ward K.C. and *Du Parcq* for the appellant.

Where husband and wife are only temporarily living apart an agreement like that in the present case confers no contractual rights. There was no agreement for a separation. The agreement here was a purely domestic arrangement intended to take effect until the wife should rejoin her husband. It

cannot be regarded as a binding contract. The wife gave no consideration for the promise.

On the evidence it is submitted that this was a temporary domestic arrangement caused by the absence of the husband abroad, and was not intended to have a contractual operation.

Hawke K.C. and *Tebbs* for the respondent.

Where a husband and wife are living together the wife is as capable of contracting with her husband that he shall give her a particular sum as she is of contracting with any other person.

Where husband and wife separate by mutual consent, the wife making her own terms as to her income and that income proves insufficient for her support, the wife has no authority to pledge her husband's credit: *Eastland* v. *Burchell.* (1)

[DUKE L.J. That may be because they must be taken to have agreed not to live as husband and wife.]

Living apart is a question of fact. If the parties live apart by mutual consent the right of the wife to pledge her husband's credit arises. If, however, instead of doing so she agrees to give up that right and to accept an allowance instead, she is entitled to sue for it.

The agency of the wife arises either where the husband leaves her wrongfully, or where the parties are by mutual consent living apart.

In Lush on Husband and Wife, 3rd ed., p. 404, it is stated that: "If the wife is living apart from her husband either (*a*) on account of the husband's misconduct, the wife being left without adequate means; (*b*) or by mutual consent; and the husband has agreed to make her an allowance, and neglects to pay it, the law gives her an absolute authority to pledge his credit for suitable necessaries."

[DUKE L.J. Are not those cases where the parties are matrimonially separated?]

[WARRINGTON L.J. referred to Lush on Husband and Wife, 3rd ed., p. 386.]

The agency arises where there is a separation in fact. The

(1) (1878) 3 Q. B. D. 432.

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consideration for the promise by the husband to pay the allowance was that she gave up her right to pledge his credit.

[DUKE L.J. The husband has a right to withdraw the authority to pledge his credit. The wife's consent, therefore, cannot be treated as consideration to support such a contract as this.]

Where a husband leaves his wife in England and goes abroad it is no longer at his will that she shall have authority to pledge his credit. If there be a separation in fact (except for the wife's guilt) the agency of necessity arises. The parties here intended to enter into a binding contract.

WARRINGTON L.J. (after stating the facts). Those being the facts we have to say whether there is a legal contract between the parties, in other words, whether what took place between them was in the domain of a contract or whether it was merely a domestic arrangement such as may be made every day between a husband and wife who are living together in friendly intercourse. It may be, and I do not for a moment say that it is not, possible for such a contract as is alleged in the present case to be made between husband and wife. The question is whether such a contract was made. That can only be determined either by proving that it was made in express terms, or that there is a necessary implication from the circumstances of the parties, and the transaction generally, that such a contract was made. It is quite plain that no such contract was made in express terms, and there was no bargain on the part of the wife at all. All that took place was this: The husband and wife met in a friendly way and discussed what would be necessary for her support while she was detained in England, the husband being in Ceylon, and they came to the conclusion that 30*l.* a month would be about right, but there is no evidence of any express bargain by the wife that she would in all the circumstances treat that as in satisfaction of the obligation of the husband to maintain her. Can we find a contract from the position of the parties? It seems to me it is quite impossible. If we were to imply such a contract in this case we should be

implying on the part of the wife that whatever happened and whatever might be the change of circumstances while the husband was away she should be content with this 30*l.* a month, and bind herself by an obligation in law not to require him to pay anything more; and on the other hand we should be implying on the part of the husband a bargain to pay 30*l.* a month for some indefinite period whatever might be his circumstances. Then again it seems to me that it would be impossible to make any such implication. The matter really reduces itself to an absurdity when one considers it, because if we were to hold that there was a contract in this case we should have to hold that with regard to all the more or less trivial concerns of life where a wife, at the request of her husband, makes a promise to him, that is a promise which can be enforced in law. All I can say is that there is no such contract here. These two people never intended to make a bargain which could be enforced in law. The husband expressed his intention to make this payment, and he promised to make it, and was bound in honour to continue it so long as he was in a position to do so. The wife on the other hand, so far as I can see, made no bargain at all. That is in my opinion sufficient to dispose of the case.

It is unnecessary to consider whether if the husband failed to make the payments the wife could pledge his credit or whether if he failed to make the payments she could have made some other arrangements. The only question we have to consider is whether the wife has made out a contract which she has set out to do. In my opinion she has not.

I think the judgment of Sargant J. cannot stand, the appeal ought to be allowed and judgment ought to be entered for the defendant.

DUKE L.J. I agree. This is in some respects an important case, and as we differ from the judgment of the Court below I propose to state concisely my views and the grounds which have led me to the conclusion at which I have arrived. Substantially the question is whether the promise of the husband to the wife that while she is living absent from

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him he will make her a periodical allowance involves in law a consideration on the part of the wife sufficient to convert that promise into a binding agreement. In my opinion it does not. I do not dissent, as at present advised, from the proposition that the spouses in this case might have made an agreement which would have given the plaintiff a cause of action, and I am inclined to think that the promise of the wife in respect of her separate estate could have founded an action in contract within the principles of the Married Women's Property Act, 1882. But we have to see whether there is evidence of any such exchange of promises as would make the promise of the husband the basis of an agreement. It was strongly urged by Mr. Hawke that the promise being absolute in form ought to be construed as one of the mutual promises which make an agreement. It was said that a promise and an implied undertaking between strangers, such as the promise and implied undertaking alleged in this case would have founded an action on contract. That may be so, but it is impossible to disregard in this case what was the basis of the whole communications between the parties under which the alleged contract is said to have been formed. The basis of their communications was their relationship of husband and wife, a relationship which creates certain obligations, but not that which is here put in suit. There was a discussion between the parties while they were absent from one another, whether they should agree upon a separation. In the Court below the plaintiff conceded that down to the time of her suing in the Divorce Division there was no separation, and that the period of absence was a period of absence as between husband and wife living in amity. An agreement for separation when it is established does involve mutual considerations.

That was why in *Eastland* v. *Burchell* (1) the agreement for separation was found by the learned judge to have been of decisive consequence. But in this case there was no separation agreement at all. The parties were husband and wife, and subject to all the conditions, in point of law, involved in that

(1) 3 Q. B. D. 432.

relationship. It is impossible to say that where the relationship of husband and wife exists, and promises are exchanged, they must be deemed to be promises of a contractual nature. In order to establish a contract there ought to be something more than mere mutual promises having regard to the domestic relations of the parties. It is required that the obligations arising out of that relationship shall be displaced before either of the parties can found a contract upon such promises. The formula which was stated in this case to support the claim of the lady was this: In consideration that you will agree to give me 30*l.* a month I will agree to forego my right to pledge your credit. In the judgment of the majority of the Court of Common Pleas in *Jolly* v. *Rees* (1), which was affirmed in the decision of *Debenham* v. *Mellon*. (2) Erle C.J. states this proposition (3): "But taking the law to be, that the power of the wife to charge her husband is in the capacity of his agent, it is a solecism in reasoning to say that she derives her authority from his will, and at the same time to say that the relation of wife creates the authority against his will, by a presumptio juris et de jure from marriage." What is said on the part of the wife in this case is that her arrangement with her husband that she should assent to that which was in his discretion to do or not to do was the consideration moving from her to her husband. The giving up of that which was not a right was not a consideration. The proposition that the mutual promises made in the ordinary domestic relationship of husband and wife of necessity give cause for action on a contract seems to me to go to the very root of the relationship, and to be a possible fruitful source of dissension and quarrelling. I cannot see that any benefit would result from it to either of the parties, but on the other hand it would lead to unlimited litigation in a relationship which should be obviously as far as possible protected from possibilities of that kind. I think, therefore, that in point of principle there is no foundation for the claim which is made here, and I am satisfied that there was no consideration

(1) (1864) 15 C. B. (N. S.) 628. (2) (1880) 6 App. Cas. 24.
(3) 15 C. B. (N. S.) 641.

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moving from the wife to the husband or promise by the husband to the wife which was sufficient to sustain this action founded on contract. I think, therefore, that the appeal must be allowed.

ATKIN L.J. The defence to this action on the alleged contract is that the defendant, the husband, entered into no contract with his wife, and for the determination of that it is necessary to remember that there are agreements between parties which do not result in contracts within the meaning of that term in our law. The ordinary example is where two parties agree to take a walk together, or where there is an offer and an acceptance of hospitality. Nobody would suggest in ordinary circumstances that those agreements result in what we know as a contract, and one of the most usual forms of agreement which does not constitute a contract appears to me to be the arrangements which are made between husband and wife. It is quite common, and it is the natural and inevitable result of the relationship of husband and wife, that the two spouses should make arrangements between themselves—agreements such as are in dispute in this action—agreements for allowances, by which the husband agrees that he will pay to his wife a certain sum of money, per week, or per month, or per year, to cover either her own expenses or the necessary expenses of the household and of the children of the marriage, and in which the wife promises either expressly or impliedly to apply the allowance for the purpose for which it is given. To my mind those agreements, or many of them, do not result in contracts at all, and they do not result in contracts even though there may be what as between other parties would constitute consideration for the agreement. The consideration, as we know, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other. That is a well-known definition, and it constantly happens, I think, that such arrangements made between husband and wife are arrangements in which there are mutual promises, or in which there

is consideration in form within the definition that I have mentioned. Nevertheless they are not contracts, and they are not contracts because the parties did not intend that they should be attended by legal consequences. To my mind it would be of the worst possible example to hold that agreements such as this resulted in legal obligations which could be enforced in the Courts. It would mean this, that when the husband makes his wife a promise to give her an allowance of 30*s.* or 2*l.* a week, whatever he can afford to give her, for the maintenance of the household and children, and she promises so to apply it, not only could she sue him for his failure in any week to supply the allowance, but he could sue her for non-performance of the obligation, express or implied, which she had undertaken upon her part. All I can say is that the small Courts of this country would have to be multiplied one hundredfold if these arrangements were held to result in legal obligations. They are not sued upon, not because the parties are reluctant to enforce their legal rights when the agreement is broken, but because the parties, in the inception of the arrangement, never intended that they should be sued upon. Agreements such as these are outside the realm of contracts altogether. The common law does not regulate the form of agreements between spouses. Their promises are not sealed with seals and sealing wax. The consideration that really obtains for them is that natural love and affection which counts for so little in these cold Courts. The terms may be repudiated, varied or renewed as performance proceeds or as disagreements develop, and the principles of the common law as to exoneration and discharge and accord and satisfaction are such as find no place in the domestic code. The parties themselves are advocates, judges, Courts, sheriff's officer and reporter. In respect of these promises each house is a domain into which the King's writ does not seek to run, and to which his officers do not seek to be admitted. The only question in this case is whether or not this promise was of such a class or not. For the reasons given by my brethren it appears to me to be plainly established that the promise here was

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not intended by either party to be attended by legal consequences. I think the onus was upon the plaintiff, and the plaintiff has not established any contract. The parties were living together, the wife intending to return. The suggestion is that the husband bound himself to pay 30*l.* a month under all circumstances, and she bound herself to be satisfied with that sum under all circumstances, and, although she was in ill-health and alone in this country, that out of that sum she undertook to defray the whole of the medical expenses that might fall upon her, whatever might be the development of her illness, and in whatever expenses it might involve her. To my mind neither party contemplated such a result. I think that the parol evidence upon which the case turns does not establish a contract. I think that the letters do not evidence such a contract, or amplify the oral evidence which was given by the wife, which is not in dispute. For these reasons I think the judgment of the Court below was wrong and that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Lewis & Lewis.*

Solicitors for respondent: *Sawyer & Withall, for John C. Buckwell, Brighton.*

G. A. S.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D.
1919
May 6, 7, 8.
C. A.
June 26, 27.

PAYZU, LIMITED *v.* SAUNDERS.

[1918 P. 658.]

Sale of Goods—Delivery by Instalments—Failure to make punctual Payment—No Inference of Repudiation—Refusal of Seller to make further Deliveries under Contract—Mitigation of Damages—Alternative Offer by Seller—Duty of Buyer to accept.

A contract for the sale of goods by the defendant to the plaintiffs provided that delivery should be as required during a period of nine months, and that payment should be made for each instalment within one month of delivery less 2½ per cent. discount. The plaintiffs failed to make punctual payment for the first instalment, and the defendant, in the erroneous belief that the plaintiffs' failure to pay was due to their lack of means, refused to deliver any more of the goods under the contract, but offered to deliver the goods at the contract price if the plaintiffs would agree to pay cash at the time of the orders. The plaintiffs did not accept this offer, and, the market price of the goods having risen, brought an action against the defendant for breach of contract, claiming as damages the difference between the market price and the contract price:—

Held, by McCardie J., that the plaintiffs' failure to make punctual payment for the first instalment did not in the circumstances show an intention to repudiate the whole contract, and that the defendant was liable for damages; but that the plaintiffs should have mitigated their loss by accepting the defendant's offer, and that the damages recoverable were, not the difference between the market price and the contract price, but only such loss as the plaintiffs would have suffered if they had accepted that offer.

Brace v. *Calder* [1895] 2 Q. B. 253 followed and applied.

Held, by the Court of Appeal, that the question what steps a plaintiff in an action for breach of contract should take towards mitigating the damage is a question of fact and not of law; and that the Court below had come to a proper conclusion on this question.

ACTION tried by McCardie J. without a jury.

By a contract in writing dated November 9, 1917, the defendant, who was a dealer in silk, agreed to sell to the plaintiffs 200 pieces of crêpe de chine at 4*s*. 6*d*. a yard and 200 pieces at 5*s*. 11*d*. a yard, "delivery as required January to September, 1918; conditions, 2½ per cent. 1 month," which meant that payment for goods delivered up to the

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twentieth day of any month should be made on the twentieth day of the following month, subject to 2½ per cent. discount. At the request of the plaintiffs the defendant delivered, in November, 1917, a certain quantity of the goods under the contract, the price of which amounted to 76*l.*, less 2½ per cent. discount. On December 21 the plaintiffs drew a cheque in favour of the defendant in payment of these goods, but the cheque was never received by the defendant. Early in January, 1918, the defendant telephoned to the plaintiffs asking why she had not received a cheque. The plaintiffs then drew another cheque, but owing to a delay in obtaining the signature of one of the plaintiffs' directors, this cheque was not sent to the defendant until January 16. On that day the plaintiffs gave an order by telephone for further deliveries under the contract. The defendant in the belief, which was in fact erroneous, that the plaintiffs' financial position was such that they could not have met the cheque which they alleged had been drawn in December, wrote to the plaintiffs on January 16 refusing to make any further deliveries under the contract unless the plaintiffs paid cash with each order. The plaintiffs refused to do this, and after some further correspondence brought this action claiming damages for breach of contract. The damages claimed were the difference between the market prices in the middle of February, 1918, and the contract prices of the two classes of goods, the difference alleged being respectively 1*s.* 3*d.* and 1*s.* 4*d.* a yard.

Compston K.C. and *R. J. Willis* for the defendant. The failure of the plaintiffs to make punctual payment for the first instalment of the goods justified the defendant in drawing the inference that the plaintiffs were intending to repudiate the whole contract, and the defendant was therefore not bound to make any further deliveries under the contract: *Freeth* v. *Burr* (1); *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) But assuming that the defendant has committed a breach of the contract, it was the duty of the plaintiffs to mitigate their loss so far as possible, and they should have

(1) (1874) L. R. 9 C. P. 208. (2) (1884) 9 App. Cas. 434.

accepted the offer of the defendant to deliver the goods against cash.

J. B. Matthews K.C. and *Turrell* for the plaintiffs. The defendant, not the plaintiffs, repudiated the contract. The doctrine of the mitigation of damages must be applied in a reasonable manner, and should not be made a fetish. It is not reasonable to expect a business man to enter into fresh contractual relations with a party who has just committed a breach of his contract. [They referred to ss. 10 and 31, sub-s. 2, of the Sale of Goods Act, 1893.]

[McCARDIE J. referred to *Brace* v. *Calder*. (1)]

Cur. adv. vult.

May 8. McCARDIE J., after stating the facts, said: It has been contended on behalf of the defendant that the failure of the plaintiffs to pay on or about December 20 for the goods delivered in November constituted in the circumstances such a breach of contract as amounted to a repudiation of the whole contract, and reliance was placed on *Mersey Steel and Iron Co.* v. *Naylor, Benzon & Co.* (2) It is not necessary to recapitulate the facts of that well-known case. In my opinion the decision so far from being in favour of the present defendant is distinctly against her. It is sufficient to refer to the following passage from the opinion of Lord Selborne (3): "I am content to take the rule as stated by Lord Coleridge in *Freeth* v. *Burr* (4), which is in substance, as I understand it, that you must look at the actual circumstances of the case in order to see whether the one party to the contract is relieved from its future performance by the conduct of the other; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part; and I think that nothing more is necessary in the present case than to look at

(1) [1895] 2 Q. B. 253.
(2) 9 App. Cas. 434.
(3) Ibid. 438, 439.
(4) L. R. 9 C. P. 208.

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the conduct of the parties, and see whether anything of that kind has taken place here."

It is essential to remember in the present case that by s. 10 of the Sale of Goods Act, 1893, it is provided that unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale, and by s. 31 where there is a sale of goods to be delivered by stated instalments which are to be separately paid for, and the buyer refuses to pay for one or more instalments, "it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated." It is to be observed that in the present case the contract did not provide for delivery in any particular number of instalments. The deliveries were to be extended over the period from January to September, and it was contemplated that there would be an unspecified number of deliveries and a corresponding number of payments. I may, with diffidence, refer to my own judgment in *In re Rubel Bronze and Metal Co. and Vos* (5), where I referred to the leading authorities. I recognized that in certain circumstances a single breach of a contract may amount to a repudiation of the whole contract. I adhere to what I said in that case, but in the present case I entertain no doubt whatever that the plaintiffs' failure to make punctual payment for the November delivery did not amount to a repudiation of the contract, nor did it go to the root of the contract; on the other hand, in my opinion, the defendant's letter of January 16 did in fact and in law amount to an unjustifiable refusal by her to carry out her contractual obligations, for she announced in clear terms that she would thenceforth deliver no further goods to the plaintiffs under the contract unless the plaintiffs paid cash to cover each invoice. The market price of these goods was rising from the beginning of January and continued to rise up to the middle of February. The plaintiffs claim to

(1) [1918] 1 K. B. 315.

be entitled to damages based on the market price at that date. I find as a fact that the market prices in February were respectively 6*d.* and 7*d.* per yard in excess of the contract prices. The plaintiffs did not in fact purchase goods as against their contract with the defendant. They asserted that the market was so bare of goods as to render purchases impracticable.

Now a serious question of law arises on the question of damages. I find as a fact that the defendant was ready and willing to supply the goods to the plaintiffs at the times and prices specified in the contract, provided the plaintiffs paid cash on delivery. Mr. Matthews argued with characteristic vigour and ability that the plaintiffs were entitled to ignore that offer on the ground that a person who has repudiated a contract cannot place the other party to the contract under an obligation to diminish his loss by accepting a new offer made by the party in default.

The question is one of juristic importance. What is the rule of law as to the duty to mitigate damages? I will first refer to the judgment of Cockburn C. J. in *Frost* v. *Knight*, (1) where he said: "In assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man, ought in reason to have done, whereby his loss has been, or would have been, diminished." This rule is strikingly exemplified in *Brace* v. *Calder*. (2) There the plaintiff claimed damages for wrongful dismissal. He had been employed as manager of a business carried on by four persons in partnership. In the course of his employment two of the partners retired, and the business continued to be carried on by the two remaining partners. The plaintiff resented his technical dismissal which resulted from the dissolution of the partnership, and declined to serve the two remaining partners; and he brought an action against the original firm claiming damages for wrongful dismissal. There was a difference of opinion in the Court of Appeal as to whether the plaintiff had been wrongly dismissed, but the members of

(1) (1872) L. R. 7 Ex. 111, 115. (2) [1895] 2 Q. B. 253.

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the Court were unanimously of opinion that the plaintiff as a prudent, reasonable man should have accepted the offer of the two remaining partners to retain him in their service, and that he was therefore entitled to nominal damages only. I think that the substance of the rule which I have indicated was also laid down by the House of Lords in *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1), where Lord Haldane said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps."

The question, therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract. I feel no inclination to allow in a mercantile dispute an unhappy indulgence in far-fetched resentment or an undue sensitiveness to slights or unfortunately worded letters. Business often gives rise to certain asperities. But I agree that the plaintiffs in deciding whether to accept the defendant's offer were fully entitled to consider the terms in which the offer was made, its bona fides or otherwise, its relation to their own business methods and financial position, and all the circumstances of the case; and it must be remembered that an acceptance of the offer would not preclude an action for damages for the actual loss sustained. Many illustrations might be given of the extraordinary results which would follow if the plaintiffs were entitled to reject the defendant's offer and incur a substantial measure of loss which would have been avoided by their acceptance of the offer. The plaintiffs were in fact in a position to pay cash for the goods, but instead of accepting the defendant's offer, which was made perfectly bona fide, the plaintiffs permitted themselves to sustain a large measure of loss which as prudent and reasonable people they ought to have avoided. But the fact that the plaintiffs have claimed damages on an erroneous

(1) [1912] A. C. 673, 689.

principle does not preclude me from awarding to them such damages as they have in fact suffered, calculated upon the correct basis. See *Cory* v. *Thames Ironworks and Shipbuilding Co.* (1) They have suffered serious and substantial business inconvenience, and I conceive that I am entitled to award them damages for that. The authorities are conveniently collected in Arnold on Damages at p. 13. Moreover, even if the plaintiffs had accepted the defendant's offer, they would nevertheless have lost the very useful period of credit which the contract gave them. Taking into consideration all the circumstances of the case I have come to the conclusion that the right sum to award as damages is 50*l*. I give judgment for the plaintiffs for that amount, and in view of the important points involved I give costs on the High Courtscale.

Judgment for plaintiffs.

F. O. R.

The plaintiffs appealed on the question of damages.

June 26, 27. *J. B. Matthews K.C.* and *Turrell* for the appellants cited *Wilson* v. *Hicks* (2) and *Brace* v. *Calder*. (3) *Compston K.C.* and *R. J. Willis* for the respondent were not called on.

BANKES L.J. At the trial of this case the defendant, the present respondent, raised two points: first, that she had committed no breach of the contract of sale, and secondly that, if there was a breach, yet she had offered and was always ready and willing to supply the pieces of silk, the subject of the contract, at the contract price for cash; that it was unreasonable on the part of the appellants not to accept that offer, and that therefore they cannot claim damages beyond what they would have lost by paying cash with each order instead of having a month's credit and a discount of 2½ per cent. We must take it that this was the offer made by the respondent. The case was fought and the learned

(1) (1868) L. R. 3 Q. B. 181. (2) (1857) 26 L. J. (Ex.) 242.
(3) [1895] 2 Q. B. 253.

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judge has given judgment upon that footing. It is true that the correspondence suggests that the respondent was at one time claiming an increased price. But in this Court it must be taken that the offer was to supply the contract goods at the contract price except that payment was to be by cash instead of being on credit.

In these circumstances the only question is whether the appellants can establish that as matter of law they were not bound to consider any offer made by the respondent because of the attitude she had taken up. Upon this point McCardie J. referred to *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London* (1), where Lord Haldane L.C. said: "The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this first principle is qualified by a second, which imposes on a plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps. In the words of James L.J. in *Dunkirk Colliery Co.* v. *Lever* (2): 'What the plaintiffs are entitled to is the full amount of the damage which they have really sustained by a breach of the contract. The person who has broken the contract not being exposed to additional cost by reason of the plaintiffs not doing what they ought to have done as reasonable men, and the plaintiffs not being under any obligation to do anything otherwise than in the ordinary course of business.'" It is plain that the question what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case. There may be cases where as matter of fact it would be unreasonable to expect a plaintiff to consider any offer made in view of the treatment he has received from the defendant. If he had been rendering personal services and had been dismissed after being accused in presence of others of being a thief, and if after that his employer had offered to take him back into his service, most persons would think he was justified in refusing the offer,

(1) [1912] A. C. 673, 689. (2) (1878) 9 Ch. D. 20, 25.

and that it would be unreasonable to ask him in this way to mitigate the damages in an action of wrongful dismissal. But that is not to state a principle of law, but a conclusion of fact to be arrived at on a consideration of all the circumstances of the case. Mr. Matthews complained that the respondent had treated his clients so badly that it would be unreasonable to expect them to listen to any proposition she might make. I do not agree. In my view each party was ready to accuse the other of conduct unworthy of a high commercial reputation, and there was nothing to justify the appellants in refusing to consider the respondent's offer. I think the learned judge came to a proper conclusion on the facts, and that the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. Whether it be more correct to say that a plaintiff must minimize his damages, or to say that he can recover no more than he would have suffered if he had acted reasonably, because any further damages do not reasonably follow from the defendant's breach, the result is the same. The plaintiff must take "all reasonable steps to mitigate the loss consequent on the breach," and this principle "debars him from claiming any part of the damage which is due to his neglect to take such steps": *British Westinghouse Electric and Manufacturing Co.* v. *Underground Electric Railways Co. of London*, per Lord Haldane L.C. (1) Mr. Matthews has contended that in considering what steps should be taken to mitigate the damage all contractual relations with the party in default must be excluded. That is contrary to my experience. In certain cases of personal service it may be unreasonable to expect a plaintiff to consider an offer from the other party who has grossly injured him; but in commercial contracts it is generally reasonable to accept an offer from the party in default. However, it is always a question of fact. About the law there is no difficulty.

EVE J. I agree. But for the difficulty introduced by the respondent's demand for a higher price than that named in

(1) [1912] A. C. 673, 689.

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the contract, I think this is a plain case. That difficulty is more apparent than real. It was not raised in the Court below, and there is not enough evidence to enable us to give effect to it, assuming it to be a matter of substance.

Appeal dismissed.

Solicitors for appellants: *W. H. Martin & Co.*
Solicitors for respondent: *S. Myers & Son.*

W. H. G.

Dicta of SCRUTTON, L.J., and BANKES, L.J., at pp. 598, 593, *applied*. WALFORD *v.* NARIN [1948] 2 All E.R. 85.

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[IN THE COURT OF APPEAL.]

THIRKELL *v.* CAMBI.

[1919 T. 58.]

Contract—Memorandum in Writing—Sale of Goods—Letter repudiating Contract—Solicitor—"Agent in that behalf"—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *s.* 4.

By s. 4, sub-s. 1, of the Sale of Goods Act, 1893, a contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless, failing other alternatives, "some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf":—

Held, by the Court (Bankes and Scrutton L.JJ., and Eve J.), that a letter signed by the party to be charged or his agent in that behalf, and referring to other letters as containing the terms of a contract may, although it repudiates liability on the contract, be a sufficient note or memorandum in writing; but if, while referring to other letters, it refuses to admit that they contain the terms of the contract, it is not a sufficient note or memorandum.

Bailey v. *Sweeting* (1861) 9 C. B. (N. S.) 843; *Wilkinson* v. *Evans* (1866) L. R. 1 C. P. 407; *Buxton* v. *Rust* (1871), L. R. 7 Ex. 1, distinguished.

Held, further, by Scrutton L.J., that the letters in question omitted a material term of the contract.

Held, by Bankes L.J. and Eve J., that a solicitor instructed to deny a contract with which his client is charged is not the client's agent to make or sign a note or memorandum in writing of the contract for the purposes of the statute.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

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The plaintiff alleged that on November 7, 1918, he agreed to sell and the defendant agreed to buy six cases containing in all 4800 Gualaquiza straw hats at 6*s.* 6*d.* a hat. On November 8 a sale note was sent by the plaintiff to the defendant in these terms: Mr. I. Cambi . . . . I have yesterday sold to you the following Panama hats" [here followed marks, number, and description of the hats] "Payable by acceptance 520*l.* due January 10, 1919, 520*l.* due February 1, 1919, 520*l.* due February 15, 1919. Interest 1% over Bank rate and stamps to be to your charge. Yours faithfully, H. V. Thirkell."

On November 12, 1918, the plaintiff sent to the defendant an invoice in the following terms: "Mr. I. Cambi . . . . Dr. to H. V. Thirkell . . . . Gualaquiza Panama hats (ladies') $\frac{\text{M G.C.}}{\text{M,}}$ Nos. 180/191 6 cases of 800 each = 4800 at 6*s.* 6*d.* net, 1560*l.* Particulars as per my letter of November 8. Goods awaiting your instructions."

The plaintiff drew three bills of exchange on the defendant, dated November 11, 13, 16, for 580*l.* 5*s.* 10*d.*, 500*l.* and 500*l.* respectively, but the defendant did not accept them because, as he told the plaintiff's agent, he insisted that the goods were to be delivered at his factory at Boreham Wood in Hertfordshire. On November 29 the plaintiff wrote to the defendant: "Kindly return the drafts with your acceptances and the goods will be forwarded directly to Boreham Wood. As the original terms agreed upon were cheque against delivery order, carriage to Boreham Wood will be to your charge." On December 5 he wrote: "The inspecting order for the Gualaquiza hats at Smith's wharf is at your disposal here; also the delivery order against acceptance of the drafts sent you." On December 9 he wrote: "I enclose an inspecting order on Smith's warehouse to save time and further delay re Gualaquiza Panamas as per my invoice dated November 12, 1918, 1560*l.*" On December 11 he wrote: "Contract November 8, 1918. Referring to the six cases Gualaquiza Panama hats lying at Smith's warehouse, Cross Lane, London, particulars of which are set out in my letters to you and which you agreed to purchase, I must now formally ask you to return the drafts, which I sent you, duly accepted. Against your

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acceptances I will, as I have already explained, hand you a delivery order on Smith's warehouse. You can, if you wish, inspect the goods at Smith's warehouse before handing me the acceptance. . . . . The matter, however, must be dealt with this week, otherwise we shall reluctantly be compelled to place the case in our solicitor's hands. . . . . On December 12 the defendant wrote to the plaintiff: "As you have not delivered the Panama hoods [*sic*], I beg to return your drafts, the goods being now too late for my requirements."

On December 14 the plaintiff's solicitors wrote to the defendant: "We have been consulted by Mr. H. V. Thirkell with reference to the sale by him to you of six cases of Gualaquiza Panama hats which you agreed to purchase, and in connection with which he has handed us the correspondence, including the letters passing between you and him on the 11th and 12th inst. There has been no delay on our client's part, and the failure by you to carry out the terms of the contract has constituted a breach of the contract. Our client's loss we understand is 250*l*., and he looks to you for recoupment of his loss." After further letters had been written by the plaintiff's solicitors, the defendant's solicitor on January 2, 1919, wrote to the plaintiff's solicitors as follows: "*Cambi* v. *Thirkell*. Your letters to my client, Mr. I. Cambi, relating to this matter have been handed to me. I am instructed to inform you that the terms upon which the goods were agreed to be purchased were not carried out by your client. My client therefore declined to accept the bills in payment. If these terms had been carried out part of the goods could have been sold by my client at a profit. I will undertake to appear for my client to any proceedings your client may think fit to commence."

The plaintiff brought an action for breach by the defendant of the contract contained in the sale note of November 8 and the invoice of November 12; he alleged that the defendant had broken this contract by refusing to accept the hats, and he claimed 780*l*., the difference between the contract price of the hats and their market price at the date of the breach. The defendant denied that the sale note and invoice contained

the terms of any contract between the parties, and pleaded s. 4 of the Sale of Goods Act, 1893. Alternatively he alleged that if there was any contract between the parties it was upon the terms that the hats were to be delivered to him at Boreham Wood and that the defendant was never ready or able to deliver there.

Bailhache J. held that there was no sufficient memorandum in writing to satisfy s. 4 of the Sale of Goods Act, 1893, and gave judgment for the defendant.

The plaintiff appealed.

Stuart Bevan K.C. for the appellant.

Rayner Goddard for the respondent was not called on.

The arguments of counsel sufficiently appear from the judgments.

BANKES L.J. In this case the appellant claimed damages for non-acceptance by the respondent of certain goods above the value of 10*l.* alleged to have been sold by the appellant to the respondent. The defence was that there was no note or memorandum in writing of the contract made and signed by the party to be charged or his agent in that behalf within the meaning of s. 4 of the Sale of Goods Act, 1893. There was no suggestion of any note or memorandum signed by the party to be charged himself, but the appellant relied on a letter dated January 2, 1919, written and signed by the respondent's solicitor, as being a sufficient memorandum in writing signed by the agent of the respondent in that behalf.

A number of points arise upon this contention and the respondent's answer. The appellant says that he wrote a number of letters to the respondent which contain the terms of an agreement come to between himself and the respondent's representative. The first question raised was whether these letters do contain terms agreed upon or whether they show that there were terms which never were agreed upon. Take for example the terms as to the mode of delivery and the conditions of payment. The letter of November 29 suggests that payment was to be made by cheque against delivery order. Later in the negotiations bills of exchange were

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substituted for a cheque. In the correspondence relating to these bills there is nothing to show whether payment was to be made against delivery order. Mr. Bevan contended for the view that, though there was a change in the manner of payment, it is to be assumed that all the other terms of the bargain stood as originally agreed upon. I am not prepared to draw that inference, but for the purposes of this case I will assume that the letters do contain the terms of the bargain.

A second question was whether parol evidence is admissible to identify these letters as the letters referred to in the letter of January 2. There is something to be said against admitting the evidence, but I will assume that the appellant can bring his case within the principle of *Cave* v. *Hastings* (1), and that the parol evidence is required merely to identify the particular documents referred to in the letter of January 2.

But there are two other points which are obstacles in the appellant's way. First, assuming that Mr. Carr's letter of January 2 refers to a note or memorandum in writing, does it recognize the note or memorandum as containing the terms of the agreement between the parties? *Bailey* v. *Sweeting* (2), *Wilkinson* v. *Evans* (3) and *Buxton* v. *Rust* (4) establish clearly that unless it does so it is not a sufficient memorandum. In *Bailey* v. *Sweeting* (5) Erle C.J. said: "There was a letter, however, written by the defendant, which in effect says this to the plaintiffs: 'I made a bargain with you for the purchase of chimney glasses at the sum of 38*l.* 10*s.* 6*d.*, but I declined to have them because the carrier broke them.' Now, the first part of that letter is unquestionably a note or memorandum of the bargain; it contains the price and all the substance of the contract, and there could be no dispute that if it had stopped there it would have been a good memorandum of the contract within the meaning of the statute." In *Wilkinson* v. *Evans* (6) the principle of the decision appears in the judgment of Keating J., who said: "It seems to me that the effect of this document is the same as if it had said,

(1) (1881) 7 Q. B. D. 125.
(2) 9 C. B. (N. S.) 843; 30 L. J. (C. P.) 150.
(3) L. R. 1 C. P. 407.
(4) L. R. 7 Ex. 1.
(5) 30 L. J. (C. P.) 153; 9 C. B. (N. S.) 857.
(6) L. R. 1 C. P. 411.

I bought of you at the within price the goods mentioned, but they have not been sent to me in proper condition. I have not heard anything suggested as a term of the real contract not contained in the invoice." In *Buxton* v. *Rust* (1) the headnote accurately states the principle in reporting the Court to have held that a certain letter taken in connection with other documents "constituted an unambiguous recognition of the existence of the contract and of its terms; and that there was therefore a sufficient memorandum in writing" . . . . If Mr. Bevan could have established that the letter of January 2 recognized that a contract had been made and that its terms were correctly stated in the appellant's letters, I agree it would be immaterial that it also contained a refusal to perform the contract so recognized. But it is impossible to extract any sufficient recognition from the letter of January 2. On its face it shows a refusal to recognize that the appellant's letters contain the terms of the contract and an assertion that in those letters the appellant is insisting on a term which never was part of the contract. On this point I agree with the view of Bailhache J.

The second point is equally fatal to the appellant. It was necessary for him to show that Mr. Carr, in signing the alleged memorandum, was the respondent's agent in that behalf; that he was authorized to make an admission sufficient to bind the respondent to the contract set up by the appellant. On this point we have been referred to *John Griffiths Cycle Corporation* v. *Humber & Co.* (2); *Daniels* v. *Trefusis* (3); and *North* v. *Loomes*. (4) In each of those cases the Court came to the conclusion that the person who put his name to the memorandum had authority to do what he did, even though it might have an effect which was not anticipated. In *Daniels* v. *Trefusis* (3) the solicitor for the defendant had actual authority to write and sign a letter to the plaintiff enclosing and referring to written answers by the defendant to questions put to him. In *North* v. *Loomes* (5), the defend-

(1) L. R. 7 Ex. I.
(2) [1899] 2 Q. B. 414.
(3) [1914] 1 Ch. 788.
(4) [1919] 1 Ch. 378.
(5) [1919] 1 Ch. 378.

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ant's solicitor was instructed to carry out the contract on which the plaintiff was insisting. The Court held that the letter which he wrote was within the authority implied by the nature of his employment. Younger J. said (1): "It was an essential implication that he should, if and when necessary, affirm on behalf of his client the existence and validity, on his side, of the contract he was so instructed to carry out. His authority to write the letter of February 8 was, therefore, in my opinion, complete, and this defence of the statute fails." In *John Griffiths Cycle Corporation* v. *Humber & Co.* (2) certain letters written by officers of the defendant company were relied on by the plaintiff corporation as constituting a memorandum in writing. The Court held that the writing of these letters was within the scope of the authority given to the officers by the company. In the present case there is no evidence of any actual authority given to Mr. Carr. Such authority as he had is to be inferred from the form of the letter of January 2 and from the fact that he was acting as the respondent's solicitor. The form of the letter, so far from implying authority to bind the respondent to the contract set up by the appellant, shows that Mr. Carr had instructions to repudiate that contract. It is therefore impossible to hold that he had such an authority as would make him, within the meaning of s. 4 of the Act, the "agent in that behalf" of "the party to be charged"—namely, the respondent. The judgment of Bailhache J. was right and this appeal must be dismissed.

SCRUTTON L.J. The question in this case is whether there is a sufficient note or memorandum in writing of the contract made and signed by the party to be charged or his agent in that behalf, within the meaning of s. 4 of the Sale of Goods Act, 1893, so as to entitle the appellant, the vendor, to recover. Mr. Bevan has failed to satisfy me that this particular letter of January 2 is a sufficient memorandum. It has often been said that the Statute of Frauds covers more frauds than it prevents. On the other hand those who have experience of

(1) Ibid. 383. (2) [1899] 2 Q. B. 414.

disputes as to oral contracts and of findings rather prompted by sympathy than guided by evidence know the value of a statute which removes uncertainty as to the terms of a contract by prescribing that they shall be in writing ; and it is a mistake in the administration of the law to whittle away this statute in order to do what is supposed to be justice in a particular case.

There are two classes of cases on which Mr. Bevan has founded his argument. First, those where there is a note or memorandum in writing which mentions an agreement without mentioning its terms. In these cases since *Ridgway* v. *Wharton* (1) and *Baumann* v. *James* (2) parol evidence may be given to identify the agreement mentioned with a particular agreement in writing and to prove that there was no other agreement between the parties.

Secondly, there are those cases beginning with *Bailey* v. *Sweeting* (3) in which it was held that a letter repudiating liability under an agreement may yet be a note or memorandum in writing of that agreement. Basing himself on both these classes Mr. Bevan argued, first that the letter of January 2 refers to the terms of an agreement of sale and therefore enables him to give evidence that those terms were entirely in writing and that there were no other terms, and secondly that, although it repudiates any liability under the agreement, that letter is nevertheless a memorandum in writing of the agreement. In order to make that position good it is necessary to prove two things, which may be one thing containing two elements, a signed admission that there was a contract and a signed admission of what that contract was. Subject to the question of the solicitor's authority, I think Mr. Bevan can point to a signed admission that there was a contract ; but he has no signed admission of what that contract was. That is where he fails in my view. The letter of January 2 begins: "*Cambi* v. *Thirkell*. Your letters to my client . . . relating to this matter have been handed to me." Mr. Bevan argues that the contract is to be found in those letters and

(1) (1857) 6 H. L. C. 238.
(2) (1868) L. R. 3 Ch. 508.
(3) 9 C. B. (N. S.) 843 : 30 L. J. (C. P.) 150.

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in the letters referred to in them. But when all these documents are examined, which, it is said, contain the terms of the contract and prove that there was no other contract, it is found that one term, the mode of delivery of the goods against payment, is not mentioned in the written statements of the contract. Mr. Bevan said it was agreed orally, and he sought to supply written evidence of it from a subsequent letter of November 29 which states terms of a contract, not that on which the appellant was suing but an original contract which was afterwards modified. The appellant then finds himself in this difficulty, that one of the terms on which he relies is not in writing and has to be inferred from his statement of what the contract originally was. This is the point on which he fails. It is sufficient to dispose of this appeal. Therefore, while I am disposed to agree, as insisted on by the respondent, that Mr. Carr had no authority to bind his client by the terms of the contract, I would reserve to myself liberty to consider more closely the effect of *Daniels* v. *Trefusis* (1) and *North* v. *Loomes* (2) on this point if it should become necessary to do so.

EVE J. The substantial question in this case is whether there is a sufficient note or memorandum in writing of the agreement on which the action is based to take the case out of the mischief of the Sale of Goods Act, 1893, s. 4. Mr. Bevan relied on the letter of Mr. Carr dated January 2 as constituting a sufficient memorandum. He relied therefore on a memorandum made and signed by an agent. In such a case I take it to be the law that the person who signs as an agent must be authorized to sign a memorandum of a contract of the nature of that on which the plaintiff relies, and that it is for the plaintiff to prove that the signatory was an agent so authorized. In support of this view I read a short passage from the judgment of Lord Wensleydale in *Ridgway* v. *Wharton* (3): "Now this proposition, which is an affirmative proposition, and which lies at the root of all the subsequent questions raised in this case, is a

(1) [1914] 1 Ch. 788. (2) [1919] 1 Ch. 373.
(3) 6 H. L. C. 238, 296.

proposition to be distinctly made out by the plaintiff. He must satisfy the Court not so as not to admit of a reasonable doubt, but upon the balance of the evidence that Crawter was the defendant's agent. He must prove that as a matter of fact, and if he leaves that question at the end of the case, in even scales, the plaintiff cannot prevail." This being an action founded upon a memorandum signed by an agent, the plaintiff cannot succeed unless he has affirmatively proved that the agent was authorized to sign a memorandum of the particular contract on which the plaintiff claims. In my opinion this action fails because the appellant did not prove that Mr. Carr was the agent authorized to sign on the respondent's behalf a memorandum of the contract on which the appellant claimed. But, assuming that Mr. Carr was so authorized, there remains the further question whether this letter is a memorandum of that contract. Upon this it is not necessary for me to add anything to what has been said by Bankes L.J. I think it is clear that the letter is not a recognition of the contract on which the appellant relies; it is if anything an assertion of a materially different agreement which, the writer insists, had been broken by the appellant before he attempted by his letter of November 29 to introduce the new and material term upon which alone he could succeed if he established it in this action. I agree that the appeal fails and should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Coward, Hawksley, Sons & Chance.*
Solicitor for respondent: *E. R. Carr.*

W. H. G.

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June 26, 30.

[IN THE COURT OF APPEAL.]

SHELDON *v.* BUTTERLEY COMPANY, LIMITED.

Employer and Workman—Compensation—Fatal Accident—Assessment of Compensation—Average Earnings—Probability of Increase—Claim by Dependant—Partial Dependency—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., para.* 1 (*a*) (*ii.*).

In assessing under para. 1 (*a*) (ii) of Sched. I. to the Workmen's Compensation Act, 1906, the compensation payable to a person in part dependent upon the earnings of a deceased workman, the county court judge is entitled to take into consideration the possibility of a future increase in the earnings of the deceased workman had he lived.

Rennoldson v. *Ellerman Wilson Line* (1918) 11 B. W. C. C. 70 followed.

APPEAL from an award of the judge of the Alfreton County Court, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The workman, a pitboy aged fifteen, met with a fatal accident arising out of and in the course of his employment at the respondents' (the present appellants') colliery. The respondents admitted liability and paid 50*l.* into court. The applicant, boy's mother, who was partially dependent on his earnings, declined to accept that sum, and commenced proceedings for arbitration, claiming 150*l.*

At the hearing before the county court judge the applicant, in her evidence in chief, stated that she had been a widow for 11 years; that for some months previous to his death the boy had been receiving 26*s.* a week and that she herself earned about 17*s.* 6*d.* a week. Counsel for the respondents thereupon proceeded to cross-examine her with a view of ascertaining the cost of maintaining the boy and the value of his contributions in his lifetime to the maintenance of the household. The county court judge intervened and stated that he was not being helped much by the cross-examination, and that he was going to look to the future during the next three years. Thereupon counsel discontinued his cross-examination on that point, and in answer to a question put

to him by the judge said that he was quite prepared to admit that the possible earnings of the deceased workman at the present time would be about 56*s.* a week.

The county court judge, in making his award, said that the best he could do was to decide what would have happened in the future five, six, seven or ten years, and looking to the future he came to the conclusion that the 150*l.* claimed was not excessive, and he accordingly awarded that sum.

The respondents appealed.

Rigby Swift K.C., *Greaves Lord K.C.* and *Marshall Freeman* for the respondents. The county court judge was wrong in law in excluding from his consideration matters proper to be considered in arriving at the amount of compensation reasonable and proportionate to the injury to the applicant. It was important to the respondents to know what benefit the mother was receiving from her son's earnings. Dependency is a question of fact to be determined by the county court judge on all the circumstances of the case : *Main Colliery Co.* v. *Davies* (1) ; *Tamworth Colliery Co.* v. *Hall.* (2) The county court judge was wrong in stopping the cross-examination of the mother as to the profit she was making from her son's earnings. Profit is a matter to be taken into account in estimating the amount of the compensation to be awarded, and the evidence as to it ought not to have been excluded. The county court judge is entitled to deduct from the earnings the cost of maintenance : *Tamworth Colliery Co.* v. *Hall.* (2)

Further the judge was wrong in law in taking into consideration the prospective earnings of the boy. He can only have regard to past earnings : Sched. I, para. 1. (3) The wording

(1) [1900] A. C. 358, 362.

(2) [1911] A. C. 665.

(3) Sched. I. to the Workmen's Compensation Act, 1906, provides :—

Para. (1.) "The amount of compensation under this Act shall be—

"(*a*) where death results from the injury—

"(i.) if the workman leaves any dependants wholly dependent upon his earnings, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of one hundred and fifty pounds, whichever of those sums is the larger, but not exceeding in any case three hundred pounds, provided that the amount of any weekly pay-

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of the two provisions (i.) and (ii.) of clause (*a*) of that paragraph shows that compensation is to be paid in relation to the wages of the preceding period and it excludes the possibility of taking into consideration prospective wages. Here the judge has taken into consideration prospective wages at 56*s*. a week instead of wages at 22*s*. a week, which was the actual amount of the wages that the boy was earning at the time of his death. It is admitted that *Rennoldson* v. *Ellerman Wilson Line* (1) is against the present contention. But that case may be distinguished on the ground that the deceased workman in that case had earned more than he was, in fact, earning at the time of the accident.

[ATKIN L.J. referred to *Gourlay* v. *Murray*. (2)]

[*T. E. Ellison* referred to *Smith* v. *Cope*. (3)]

Nowhere in the Act is there any provision for taking into consideration anything that may happen after the accident.

T. E. Ellison for the applicant was not called upon.

WARRINGTON L.J. This is an appeal by the employers from an award of the county court judge awarding 150*l*. as compensation to a mother partially dependent upon the earnings of her son, a boy of fifteen, who was killed in a colliery accident on December 12, 1917.

The facts are very short. At the time of the accident and for some time previously the boy had been earning about

ments made under this Act, and any lump sum paid in redemption thereof, shall be deducted from such sum, and, if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be one hundred and fifty-six times his average weekly earnings during the period of his actual employment under the said employer;

"(ii.) If the workman does not leave any such dependants, but leaves any dependants in part dependent upon his earnings, such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants. . . . ."

(1) 11 B. W. C. C. 70, 72.

(2) (1908) 1 B. W. C. C. 335.

(3) (1913) 6 B. W. C. C. 569.

26*s.* a week. The mother was a widow and had been a widow for 11 years. She had supported her boy by her own very small earnings until he was old enough to work, and when he was old enough and went to work he brought home his earnings to her. She says that he brought home nearly 40*l.* in wages and 2*l.* 10*s.* in respect of five weeks' compensation at 10*s.* a week for another accident which had happened to him previously. I take it that means that he brought home practically all, if not all, the wages he earned. There was also evidence before the county court judge that prospectively he would soon have earned about 56*s.* a week, in fact that was admitted. On that evidence the county court judge awarded 150*l.*

Two objections are taken to the award. First, it is said that the county court judge has, and it is contended wrongly, taken into account the fact that the boy's wages in the future might have been higher than those which he was earning previously to the accident, and, secondly, it is said the county court judge wrongly interposed to stop the cross-examination by the employers' counsel directed to show what amount was required for the maintenance and clothing of the boy.

I will deal first with the first objection because that seems to me to be the more important one. It is contended that the mode of assessing the compensation in the case of a partial dependant must be modelled on the mode that is laid down in para. 1 (*a*) (i.) of Sched. I. to the Act in the case of total dependants. In my opinion the true effect of para. 1 is to prescribe two totally distinct modes of ascertaining the compensation in the case of total dependency and partial dependency. In the case of total dependency the amount of compensation is to be ascertained by a purely arithmetical calculation with a certain fixed minimum and maximum. When I say a minimum I mean that in the first instance the sums awarded is by para. 1 (*a*) (i.) to be "a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l.*, whichever of those sums is the larger." I do not say that 150*l.* must always be awarded, but that that sum is to be awarded if it is larger than the three years' earnings. The point is that

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the mode of ascertaining the compensation in that case is purely arithmetical. In the case of partial dependency it is provided by para. 1 (*a*) (ii.) that the compensation is to be "such sum, not exceeding in any case the amount payable under the foregoing provisions, as may be agreed upon, or, in default of agreement, may be determined, on arbitration under this Act, to be reasonable and proportionate to the injury to the said dependants." In that case the award is to be for such a sum as the county court judge thinks to be reasonable and proportionate to the injury, but not exceeding the amount which would be payable in the case of total dependency. That seems to me to be the principle laid down by the Act for assessing compensation in these two cases, and, with regard to partial dependency, what I have said as to the mode of procedure, is, I think, entirely consistent with what was said by the House of Lords both in *Main Colliery Co.* v. *Davies* (1) and in *Tamworth Colliery Co.* v. *Hall.* (2)

With regard to taking into account prospective earnings, that, in my opinion, the county court judge is entitled to do. It was so laid down in plain terms by this Court in *Rennoldson* v. *Ellerman Wilson Line.* (3) In that case the present Master of the Rolls said: "He"—that is the workman—"was paid 6*l.* a month by the shipping company, and found in food, and appears to have given the greater part of his wages to his mother. The learned county court judge has assessed the sum payable at 115*l.* I am quite unable to say that this is not a reasonable sum. No hard and fast line can be drawn in such a case, capable of definite mathematical calculation, and if the judge has taken into consideration the fact that this boy's wages might have been increased, I am quite unable to say that it was unreasonable for him to do so." So in this case the compensation is to be proportionate to the injury. As was said by Lord Macnaghten in *Hodgson* v. *West Stanley Colliery* (4): "In a proper case the arbitrator is at liberty to award compensation on the highest scale"

(1) [1900] A. C. 358.
(2) [1911] A. C. 665.
(3) 11 B. W. C. C. 70, 72.
(4) [1910] A. C. 229, 236.

—that is to say he may award as much compensation as would be awarded in the case of total dependency—" and he ought to do so if such an award seems to him to be reasonable and proportionate to the injury." That is, what the arbitrator has to do is to see that the compensation is reasonable and proportionate to the injury. Having regard to the admission made before the county court judge and the facts proved before him I am entirely unable to see how this sum of 150*l.* is not reasonable and proportionate to the injury.

But it is said that the award is defective on another ground—namely, that the learned county court judge stopped the cross-examination as to the amount expended in food, clothing and so forth. Without saying whether it was open to him to exclude all such considerations as those, if in his opinion it was reasonable so to do, I am quite clear that although he had not the figures before him, he had before him the amount that the boy was earning at the time of his death and the admission of what he would have been likely to be earning if he had lived, and he may have taken into account the fact that the mother had not received and might not receive for her own benefit the whole of the boy's earnings.

There is nothing else in the award to indicate that the amount awarded is not reasonable and proportionate to the injury to the mother by the boy's death. For these reasons I think this appeal fails and must be dismissed.

DUKE L.J. I agree. In my opinion there was no exclusion of evidence in this case. The learned county court judge was entitled, I think, in accordance with the practice that certainly was very familiar in my time at the Bar, and of which I thought there was no reason to complain, to say to counsel, when a particular topic was being discussed, that he need not proceed to labour that point if the judge was more impressed with the difficulties that arose in another branch of the case and proposed to direct his attention to it. There is another consideration, namely that if it is proposed to complain of the rejection of evidence by a judge the point must be taken before him, in order that the appellate tribunal may be able

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to deal with the question. In the present case the point was not taken.

The question of substance that arises with regard to the evidence arises on another branch of the appeal with regard to which the learned judge is said to have misdirected himself. It is said he took no account of the limited amount of the boy's past earnings and the small profit the mother could receive out of those past earnings but that he took a disproportionate view of what the boy at an early date might have been expected to earn, which was a doubtful sum. The boy seems to have contributed handsomely to his mother; it was said that before long he would have been earning 56*s.* a week; and the main ground of the appeal is the admission of that fact by the county court judge as a fact to which he could give weight in awarding the compensation in this case. I think the county court judge was perfectly right in having regard to it.

With regard to the past earnings of the boy the learned county court judge was well aware of the facts. To my mind the chief utility of the facts as to the past was to ascertain what the boy would probably earn and do in the future. I see nothing in the Act to warrant the rejection of information or calculation with regard to his probable future earnings. It was said that the learned county court judge must probably be wrong because he had awarded the full amount of the statutory maximum. That contention was founded upon the construction of the word "proportionate" in para. 1 (*a*) (ii.) of Sched. I. I do not think the word "proportionate" there bears the meaning which was contended for. What was said was the words of the paragraph amount to a direction that the amount to be awarded should bear such a proportion to the maximum amount as the amount of contribution theretofore received bore to the cost of the maintenance of the dependent person. The paragraph does not say that. It takes the statutory maximum and says that the governing factor in deciding what proportion of the statutory maximum shall be awarded is the injury to the dependant. The injury to the dependant is the loss she or he has suffered. The injury to this dependant

is the loss she has suffered by the death of her son, and I cannot conceive any process by which the true amount of that loss is to be ascertained if you look exclusively at the past which was a period of expenditure and reject all consideration of the future which is a period of possible profit. To my mind it is clear on the authorities that in estimating the pecuniary loss the learned county court judge must have regard not only to the past but also to the probable future.

ATKIN L.J. I agree. The first complaint made against the learned county court judge is that he did not listen to the cross-examination directed to the amount of profit that this mother was making from the contributions of her son. I do not propose to say anything upon the question whether or not in order to establish partial dependency it is necessary to show that the dependant was making some profit from the contributions of the deceased, but the cross-examination was really not directed to showing partial dependency because partial dependency was admitted in the answer of the respondents, and, therefore, the only question to which it went was to determine what was the actual loss suffered by the mother. Upon that the learned county court judge had the facts with regard to the contributions this boy was making to his mother. He was earning from 22*s.* to 26*s.* a week; he was living with his mother in a rent-free house, and the two were living alone. Under those circumstances it is obviously apparent that the mother must have been making some profit, and to my mind it is quite irrelevant to determine how much that profit was because one of the circumstances of the case at which the judge must look and from which he might have come to any reasonable determination was what were likely to be the future contributions of the son. I think the judge not only was entitled to look at the prospective earnings of the son, but was bound to do so in order to ascertain what the real loss was, otherwise the mother in the case of losing the son, and the only son, the only wage earner in the family, or the young widow deprived of a young husband just before he had attained the full wage in the industry in which he was

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Atkin L.J.

working would not, to my mind, receive the compensation she was intended to receive under the Act. I think the learned county court judge acted with complete propriety so far as the law is concerned. The question of the amount awarded is not a matter we are considering and have not by law to consider. It is purely a question of fact for the judge. In this case the county court judge has found that a mother, a widow, who has lost her only son, who was at the time of his death probably giving her all his wages and at the time of the hearing before him would then have been earning as much as 56*s.* a week, is entitled to compensation, and that that compensation is to be measured by the sum of 150*l.* It is quite impossible for anyone to say that that is not a reasonable sum. I think the appeal should be dismissed.

Appeal dismissed.

Solicitors for respondents: *Henley & Sweet, for E. J. Ellis-Fermor, Ripley.*

Solicitors for applicant: *King, Wigg & Brightman, for Bertram Mather, Chesterfield.*

W. I. C.

1919 *July* 2.

PORT OF LONDON AUTHORITY, APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS.

Revenue—Excess Profits Duty—Port Authority—Trade or Business—Standard of Profits—Right of Appeal—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38, *s.* 40, *sub-s.* 2, *s.* 45, *sub-s.* 5.—*Port of London Act*, 1908 (8 *Edw.* 7, *c.* 68.)

The Port of London Authority was appointed under the Port of London Act, 1908, for the improvement and better administration of the Port of London with power to acquire and carry on the undertakings of the various dock companies on the River Thames. Its revenue was derived from rents for dock space, tolls and other sources, including dues on ships entering the port. Its surplus revenue had to be applied for the benefit of the port:—

Held, that the Authority carried on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, and was liable to be assessed to excess profits duty under that Act.

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Mersey Docks and Harbour Board v. *Lucas* (1883) 8 App. Cas. 891 followed.

No appeal lies from a decision of the Commissioners of Inland Revenue under s. 40, sub-s. 2, of the Finance (No. 2) Act, 1915, that an assessment to excess profits duty shall be based on the profits standard and not upon the percentage standard.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

AT a meeting of the Special Commissioners held on February 18, 1918, for the purpose of hearing appeals, the Port of London Authority, hereinafter called the appellants, appealed against assessments to excess profits duty in the sums of 93,055*l.* and 234,991*l.* for the accounting periods of one year to March 31, 1915, and one year to March 31, 1916, respectively made upon them by the Commissioners of Inland Revenue under the provisions of Part III. of the Finance (No. 2) Act, 1915. (1)

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 38:—"(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this Part of this Act applies, in any accounting period which ended after August 4, 1914, and before July 1, 1915, exceeded, by more than 200*l.*, the pre-war standard of profits as defined for the purposes of this Part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to 50 per cent. of that excess."

Sect. 39: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in... the United Kingdom excepting—

(*a*) husbandry in the United Kingdom; and

(*b*) offices or employments; and

(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount. . . . ."

Sect. 40: "(2.) The pre-war standard of profits for the purposes of this Part of this Act shall, subject to the provisions of this Act, be taken to be the amount of the profits arising from the trade or business on the average of any two of the three last pre-war trade years, to be selected by the taxpayer (in this Part of this Act referred to as the profits standard): Provided that if it is shown to the satisfaction of the Commissioners of Inland Revenue that that amount was less than the percentage standard as hereinafter defined, the pre-war standard of profits shall be taken to be the percentage standard."

Sect. 45: "(5.) Any person who is dissatisfied with the amount of any assessment made upon him by the Commissioners of Inland Revenue under this Part of this Act may . . . . appeal . . . . to the Special Commissioners. . . . ."

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The appellants were appointed by the Port of London Act, 1908, with powers, which had been extended or modified by later Acts, to acquire and carry on the undertakings of the several dock companies which were at the date of the Act carrying on business on the River Thames in and near London.

The appellants had carried out the duties with which they had been entrusted for improving and administering the Port of London. They had taken over and carried on the undertakings of the dock companies and other undertakings for use in connection therewith. They were owners of docks, lands, buildings, railways, warehouses, an hotel, and other works, which they managed and controlled. The only difference which existed between the manner in which the several concerns taken over by the appellants were now managed and controlled as compared with the management and control of the previous owners was that the appellants could only own, manage and control them for the purposes of and in accordance with the Port of London Acts, whereas the former owners owned, managed and controlled them with a view to the making of profits.

The revenue of the appellants was derived from dues and rent, and from rates and charges for accommodation and services rendered, and other sources including tolls. Their receipts on revenue account were by s. 21 of the Act of 1908 to be applied in the payment of working and establishment expenses, the payment of interest on Port stock and loans, contributions to sinking or redemption funds, and the balance, if any, was applicable to such purposes for the benefit of the Port as the appellants might determine. The assessments appealed against were made upon the basis of the pre-war standard of the profits of the appellants derived from the businesses transferred to them from the dock companies, etc. The appellants applied to the respondents that the assessments might be based upon a percentage standard as provided by s. 40, sub-s. 2, of the Finance Act (No. 2), 1915, but the respondents, after duly considering the application, decided that it had not been shown to their satisfaction that the amount of the profits arising from the trade or business carried

on by them on a profits standard was less than the percentage standard.

The appellants appealed against the assessments to the Special Commissioners, and it was contended by counsel on their behalf (1.) that the appellants were not a body carrying on a trade or business within the meaning of the Finance (No. 2) Act, 1915, Part III. (2.) that the appellants did not, and owing to their constitution could not, make any profits within the meaning of that Part of the Act, and that any surplus which might accrue to them in their revenue account was purely of a temporary and accidental nature and was not profit; and (3.) that the appellants were entitled to be charged on the basis of a percentage standard in lieu of the pre-war standard of profits by reference to which the assessments appealed against had been made.

Counsel on behalf of the respondents opposed the first and second contentions of the appellants, and as regards the third contention took the preliminary objection that it was not open to the appellants in proceedings upon an appeal under s. 45, sub-s. 5, of the Act of 1915, to question the decision of the respondents as to the standard of profits under s. 40, sub-s.2.

The Special Commissioners determined that the appellants were carrying on a trade or business and made profits in doing so, within the meaning of the Act, and that they (the Special Commissioners) had no authority to adjust the amount of the assessment by reference to a percentage standard.

Ryde K.C. and *Edwardes Jones* for the appellants. The appellants do not carry on a trade or business within s. 39 of the Finance (No. 2) Act, 1915. They are carrying on a dock undertaking for the benefit of the public at large, which is chargeable to income tax as a "concern" under Sched. A, rule 3, and the words "trade or business" in s. 39 do not include anything which is taxable as a "concern." The appellants do not trade in the way which the dock companies did, and any surplus of revenue must be dealt with in the manner prescribed by the Port of London Acts for the benefit of the Port. The fact that the appellants are entitled to

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charge port dues on vessels entering the port, although no services are rendered by the appellants, shows that they are not carrying on a trade or business. Secondly, an appeal lies from the decision of the Commissioners of Inland Revenue refusing to base the assessments upon the percentage standard. Sect. 45, sub-s. 5, gives a right of appeal to any person who "is dissatisfied with the amount" of an assessment. A decision under s. 40, sub-s. 2, that the percentage standard shall not be adopted is obviously one which must affect the amount of the assessment. It is true that s. 40, sub-s. 2, contains the words "if it is shown to the satisfaction of the Commissioners," but those words do not prevent an appeal from the Commissioners' decision. Under Order XIV., r. 1, a defendant has to "satisfy" the judge that he has a good defence, but nevertheless an appeal lies if judgment is given against the defendant. See also *Duke of Beaufort* v. *Crawshay*. (1)

[*Commissioners for Special Purposes of the Income Tax* v. *Pemsel* (2) and *Williamson Film Printing Co.* v. *Inland Revenue Commissioners* (3) were also referred to.]

Sir Gordon Hewart A.-G. (*T. H. Parr* and *R. P. Hills* with him) for the respondents. If the work carried on by the appellants be regarded as a whole it is clear that they are carrying on a trade or business. Those words are intended to have a wide scope and include undertakings, taxable under Sched. A, carried on by a public authority. See the Rules for computation of profits in Part I. of the Fourth Schedule. In considering whether a trade or business is carried on the public character of the work must be disregarded (*Attorney-General* v. *Black* (4)); and it is immaterial that the surplus revenue has to be devoted to certain public purposes: *Mersey Docks and Harbour Board* v. *Lucas*. (5)

As to the second point, the Commissioners of Inland Revenue have found as a fact that it was not shown to their satisfaction that the amount of the profits on

(1) (1866) L. R. 1 C. P. 699.
(2) [1891] A. C. 531.
(3) [1918] 2 K. B. 720.
(4) (1871) L. R. 6 Ex. 78, 308.
(5) 8 App. Cas. 891.

a profits standard was less than the percentage standard. The Special Commissioners rightly held that they had no power to interfere with that finding. The right of appeal given by s. 45, sub-s. 5, is limited to an appeal as to the amount of an assessment. That it does not apply to decisions of the Commissioners under s. 40 is shown by the fact that a right of appeal is expressly given in cases under sub -s. 3 of s. 40. No right of appeal is expressly given under sub-s. 2 of s. 40, and therefore none exists. Order XIV., r. 1, and *Duke of Beaufort* v. *Crawshay* (1) afford no assistance in the construction of this Act for the matters dealt with were under the general supervision of the Court.

[*Rex* v. *Inland Revenue Commissioners* (2) and *Northern Navigation Co.* v. *Inland Revenue Commissioners* (3) were also referred to.]

Ryde K.C. replied.

ROWLATT J. The first question raised by this case is whether the appellants, the Port of London Authority, carry on a trade or business within the meaning of s. 39 of the Finance (No. 2) Act, 1915, so as to render them liable to the excess profits duty imposed by that Act. The appellants are the authority appointed under the Port of London Act, 1908, for the purpose of providing for the improvement and better administration of the Port of London, and they were empowered to take over the undertakings of the dock companies. Their surplus revenue does not go to the shareholders but has to be devoted to the improvement of the port. The performance of their statutory duties involves the carrying on by them of the businesses formerly carried on by the various dock companies, and in so doing they afford dock accommodation to ships, and do stevedoring and other work which the dock companies formerly did. To this extent it would seem clear that, unless the ultimate destination of the surplus revenue makes a difference, the appellants are carrying on a trade or business.

(1) L. R. 1 C. P. 699. (2) [1918] 1 K. B. 143.
(3) (1919) 56 Sc. L. R. 171.

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But it is said that a dockowner does not carry on a "trade or business" within s. 39 because he is chargeable to income tax under Sched. A, which deals primarily with land. There would be some force in that argument if the words "trade or business" were terms of art used in the charging sections of the Income Tax Act with reference to concerns which did not include dock companies. But the words "trade or business" are not to be found in any of the charging sections, and in *Burt & Co.* v. *Inland Revenue Commissioners* (1) it was held that the words are of the widest possible character. I do not think that it can be said that this undertaking is not a trade or business merely because in the Income Tax Act it is treated as taxable under Sched. A.

But the question is rendered somewhat more complicated by the fact that the appellants receive as part of their revenue port dues which are imposed on any vessel entering the Port of London, although it may be a vessel which does not use any of the facilities provided by the appellants. These port dues cannot be said to be a source of revenue of an ordinary business undertaking, but I think one ought to look at the undertaking as a whole and consider whether having regard to everything which it does and provides it can be said to be a trade or business. In view of the wide meaning which those words have, I think that the appellants' undertaking is a trade or business.

The argument based on the fact that the appellants' surplus revenue has to be employed in the improvement of the port is disposed of by the decision in *Mersey Docks and Harbour Board* v. *Lucas* (2), which shows that when once you have got a taxable income the ultimate destination of that income is immaterial. I therefore hold that on the first question the contention of the Crown is right.

The second question raises a totally different point. Sect. 40, sub-s. 2, of the Act of 1915 provides that if it is shown to the satisfaction of the Commissioners of Inland Revenue that the amount of the pre-war standard of profits is less than the percentage standard, the percentage standard is to be sub-

(1) post p. 650; 88 L. J. (K. B.) 721. (2) 8 App. Cas. 891.

stituted for the actual profits. In this case the appellants applied to be assessed upon the percentage standard but the Commissioners refused to do so as they were not satisfied that the amount of the profits on the profits standard was less than the percentage standard. The appellants appealed from that refusal to the Special Commissioners, but they held they had no jurisdiction to entertain the appeal. Under s. 45, sub-s. 1, the Commissioners of Inland Revenue are the body to assess the excess profits duty, and by sub-s. 5 any person who is dissatisfied with the amount of his assessment is given a right of appeal. The power given to the Commissioners under s. 40, sub-s. 2, to determine which standard shall be adopted is a power with which one is quite familiar, a power given to the appropriate Government department to certify that such and such a state of things exists, and similar functions are given to the Commissioners by other sections of this Act. See for example s. 38, sub-s. 1, s. 40, s. 45, sub-s. 2, and other instances are to be found in the Fourth Schedule. I do not refer to them all and I do not say that the same principle necessarily applies to all these cases. But it is important to notice that the words in s. 40, sub-s. 2, are "if it is shown to the satisfaction of the Commissioners," and that almost identical words—namely, "on proof to their satisfaction"—are to be found in s. 23, sub-s. 2, of the Customs and Inland Revenue Act, 1890, in a case in which there could be no question of an appeal. That helps one to come to the conclusion that in this matter of deciding as to which standard of profits is to be adopted the question was intended to be left entirely to the discretion of the Commissioners, and that it is a matter collateral to the assessment of the amount of the duty.

In my opinion the Special Commissioners were right in declining jurisdiction, and this appeal therefore fails on both points.

Appeal dismissed.

Solicitors for appellants : *E. F. Turner & Sons.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

F. O. R.

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July 23, 24.

CRANE *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Super-tax—Non-resident—Chargeability—Finance (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *ss.* 66, 72.

An individual who is neither resident, nor in receipt of income, in the United Kingdom is chargeable with super-tax if in the year preceding the year of assessment to super-tax he was assessed to income tax in respect of income exceeding 2,500*l.* received in the United Kingdom.

Brooke v. *Inland Revenue Commissioners* [1918] 1 K. B. 257 applied.

CASE stated under the Finance (1909–10) Act, 1910, s. 72, sub.-s. 6, and the Taxes Management Act, 1880, s. 59, by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held on April 11, 1918, for the purpose of hearing appeals, Charles Kitteredge Crane, hereinafter called the appellant, appealed against an assessment to super-tax in the sum of 3065*l.* for the year ending April 5, 1918, made upon him under the provisions of the Finance (1909–10) Act, 1910, and subsequent enactments.

The appellant was an American subject, formerly resident in the United States of America. In September, 1912, he came to England for reasons of health and in order to undergo a course of medical treatment. He lived in hotels and boarding-houses until June, 1914, when he married an English lady, and thereafter he resided with his wife and her mother in a house belonging to and furnished by his mother-in-law. The appellant remained under medical treatment as long as he was in England, and occupied himself in temporary work as unpaid assistant secretary to a hospital in London. On September 14, 1917, he left the United Kingdom and went to Paris with the object of joining the American army in France. His wife accompanied him, and her mother also went to live in France, closing the house in which she and the appellant and his wife had resided in England. The appellant remained out of the United Kingdom for the remainder of the year

ending April 5, 1918, and it was stated in evidence that he did not intend to return. It was admitted that he was not domiciled in the United Kingdom.

For the years up to and including the year ending April 5, 1917, so far as was known to the Revenue authorities, the appellant had no business interests and no source of income in the United Kingdom except some short loan interest and bank interest received during the year ending April 5, 1917, and his income except as aforesaid was derived solely from dividends on shares in an American company, and he had been assessed to income tax under the fifth case Sched. D for each of the years 1913–14 to 1916–17 inclusive, in respect of these dividends. The amount of the assessment to income tax upon him in respect of this source of income for the year ending April 5, 1917, as finally adjusted was 3067*l.*, and upon this sum he duly paid income tax. For the year ending April 5, 1918, the appellant while in the United Kingdom was in receipt of dividends from the said shares, and in respect of his income from dividends on the said shares and also from interest on money deposited by him at a bank in the United Kingdom and from discount upon British Treasury Bills the appellant was assessed to income tax for that year under Sched. D of the Income Tax Acts. A letter from the local Surveyor of Taxes was produced by the appellant showing that this assessment to income tax under Sched. D for the year ending April 5, 1918, had been discharged. It was stated that this assessment had been discharged on the ground that under the provisions of s. 39 of the Income Tax Act, 1842, the appellant was not to be deemed to have been a person residing in the United Kingdom for that year.

On April 15, 1917, the appellant while in the United Kingdom was served with a notice requiring him to make a return of his total income from all sources for the purposes of super-tax for the year ending April 5, 1918. On June 6, 1917, he delivered a return accordingly, stating his income to be 3065*l.*, being approximately the amount of the assessment made upon him to income tax under Sched. D for the year

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ending April 5, 1917. The assessment under appeal was made in accordance with this return.

It was contended on behalf of the appellant, inter alia, that he was not chargeable to income tax for the year ending April 5, 1918, and that it followed that, as super-tax is an additional duty of income tax, he was not chargeable to super-tax for that year.

It was contended on behalf of the Crown, inter alia, that the appellant was chargeable to super-tax for the year ending April 5, 1918, on the amount by which his total income from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts, exceeded 2500*l.*

The Commissioners who heard the appeal found as a fact that the appellant was in the United Kingdom for a temporary purpose only and did not actually reside in the United Kingdom for a period equal to six months in the year ending April 5, 1918. They considered, however, that non-residence was not conclusive against liability to super-tax, and that the appellant had rightly been charged to super-tax for that year. They accordingly confirmed the assessment.

Gover K.C. and *Lavington* for the appellant. Super-tax is an additional income tax: Finance (1909–10) Act, 1910, s. 66, and by s. 72 all the provisions of the Income Tax Acts relating to the persons who are to be chargeable with duty apply to the charge of super-tax: *Bowles* v. *Attorney-General.*(1) Therefore, as the appellant was admittedly not chargeable to income tax for the year in question, he is equally exempt from super-tax. In *Brooke* v. *Inland Revenue Commissioners* (2) the appellant was held liable to super-tax, although resident abroad, because she received income in the United Kingdom in the year of assessment and was liable to income tax in respect of that income.

T. H. Parr (*Sir Gordon Hewart, A.-G.* and *R. P. Hills* with him) for the respondents. Liability to super-tax depends on

(1) [1912] 1 Ch. 123. (2) [1918] 1 K. B. 257.

whether there was a liability to income tax in the previous year: *Fitzgerald* v. *Inland Revenue Commissioners.*(1) It is immaterial whether the person to be charged has had any taxable income, or has resided, in this country during the year of assessment; it is sufficient if he had an income tax income in the previous year of an amount to which super-tax would apply. That is the effect of the decision in *Brooke's Case* (2), which did not in any way turn on the fact that the appellant had received an income in this country in the year of assessment to super-tax.

Gover K.C. The fallacy underlying the argument for the Crown is that it ignores the difference between assessment and chargeability. For the purpose of assessment the income tax income of the previous year determines the amount of the assessment to super-tax, but in considering the question of chargeability, liability to income tax in the year of assessment is essential.

Cur. adv. vult.

July 24. ROWLATT J. read the following judgment: In this case the appellant appeals from an assessment to super-tax in respect of the year 1917–1918, the amount being that of his income for the previous year from foreign possessions. In that year he had been resident in the United Kingdom, though his permanent residence was abroad, and he had been assessed to income tax in respect of the same sum, taken under the Act as the measure of his liability to super-tax for the subsequent year. In that latter year however he was not resident here for a period long enough to make him assessable to income tax, and he was treated in the argument of the Crown as being in the same position as a non-resident. The question is whether his being a non-resident in the year of assessment prevents his being assessed to super-tax for that year in the measure of the income for the previous year upon which, by virtue of his residence in that year, he was assessed to income tax.

I need not go through the sections. They are very familiar

(1) Ante, p. 154. (2) [1918] 1 K. B. 257.

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and are all set out in the report of *Brooke .. Inland Revenue Commissioners* in the Court of Appeal (1), the principle of which case (though the learned judges strictly confined themselves to the immediate point before them) must, I think, govern the present. In that case the appellant was not resident in the year of assessment but had been charged in the year before, not by virtue of residence (for she was not resident in that year either), but under the other limb of the scheme of the income tax, namely by virtue of having drawn income in that year from the United Kingdom. Under these circumstances she was held assessable to super-tax notwithstanding her non-residence in the year of assessment. If the above are all the facts upon which the decision proceeded I think the appellant in the present case must fail. If the Court of Appeal have held that a non-resident is liable to super-tax if and so far as he was liable to income tax the year before by virtue of having received English income, I think I must hold that he is equally liable if charged to income tax the year before by virtue of residence. It appears fairly clear, however, that the appellant in *Brooke's Case* (1), enjoyed her English income in the year of assessment as well as in the year before, so that she was chargeable to income tax upon this income in the year as to which the super-tax was in question. If it was that circumstance which made her an "individual" within the jurisdiction for super-tax purposes (if I may use that expression) then the decision would seem to be an authority in favour of the present appellant. Now, I do not find that the existence of the English income in the year of assessment was expressly stated as a relevant fact in the case, nor do any of the learned judges refer to it, and I do not think I can treat it as the ground of the decision. Further I do not think the Court could have based their decision on this ground without noticing (if only to reserve it) the question whether the existence of any English income in the year of assessment was sufficient to support a charge to super-tax to the extent of all the previous year's English income, whether still existing or not, and whether from the

(1) [1918] 1 K. B. 257.

same sources or not, or whether the measure of liability only extends to the items of income still existing. Warrington L.J. in his judgment says (1): "I fail to see what there is in the statute to prevent me construing the word 'individual' in that section as meaning the person at all events who has paid income tax in respect of his income." The Lord Justice, I know, says he is confining himself to the particular case before him, and Scrutton L.J., if I correctly appreciate his words, reserves the very point now before me, but I do not see how I can avoid feeling bound to hold that the limitation to be implied upon the word "individual" is simply to be found in his assessability to income tax the year before. At any rate this is a clear and broad principle by which, in effect, super-tax comes to be a further tax on the previous year's income.

I do not forget that in cases such as that before me there may be difficulties in the way of enforcing the tax. I do not think that affects the case. I have never heard it suggested that there is any legal objection to assessing a person to ordinary income tax after the year of assessment has expired and after he has left the country for good, merely because there is no means of enforcing it.

In my judgment this appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for appellant: *Richardsons, Sadler & Callard.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

(1) [1918] 1 K. B. 268.

F. O. R.

1919
July 29.

DEY *v.* MAYO.

[1918 D. 1199.]

Gaming—Cheques given for Racing Bets—Cheques indorsed by Payee—Cheques paid into Banking Account in Payee's Wife's Name—Whether Wife and "Indorsee" or "Holder"—Gaming Act, 1835 (5 & 6 *Will.* 4, *c.* 41), *ss.* 1, 2.

Sect. 1 of the Gaming Act, 1835, provides that certain securities, which by previous statutes would have been absolutely void, shall be deemed and taken to have been made, drawn, accepted, given or executed for an illegal consideration.

Sect. 2: "In case any person shall make, draw, give, or execute any note, bill, or mortgage for any consideration on account of which the same is [by certain statutes] declared to be void, and such person shall actually pay to any indorsee, holder, or assignee of such note, bill, or mortgage the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed and taken to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration as aforesaid, and shall be deemed and taken to be a debt due and owing from such last-named person to the person who shall so have paid such money, and shall accordingly be recoverable by action at law . . . ."

The plaintiff, in payment of certain racing bets, gave the defendant five cheques for the amount. The cheques were made payable to the defendant or order and crossed, and, having been indorsed by him in blank, were paid into a banking account kept in the defendant's wife's name, and duly honoured. In an action by the plaintiff to recover the amount of the cheques from the defendant under s. 2 of the Gaming Act, 1835, the judge found that the banking account into which the cheques were paid, although in the defendant's wife's name, was in fact operated on by her merely as the defendant's agent:—

Held, that the action failed as the defendant's wife was not an "indorsee" or "holder" of the cheques within the meaning of s. 2 which contemplates payment to an indorsee or holder having a title to the cheques distinct from that of the payee.

Lynn v. *Bell* (1876) Ir. R. 10 C. L. 487 and *Golding* v. *Bradlaw* ante, p. 238 distinguished.

Nicholls v. *Evans* [1914] 1 K. B. 118 applied.

ACTION tried by Avory J.

The plaintiff sued to recover 852*l* 0*s*. 8*d*., being the amount of five cheques drawn by the plaintiff in favour of the defendant or order and crossed "a/c payee, not negotiable." The cheques, which were given in respect of racing bets won by the defendant from the plaintiff, were indorsed by the defend-

ant in blank, paid into a banking account kept in the defendant's wife's name, and duly honoured. The plaintiff now claimed to be entitled to recover the sum in question under s. 2 of the Gaming Act, 1835 (1), as money had and received by the defendant to his use.

It appeared in evidence that the banking account in the defendant's wife's name was opened shortly before the defendant's bankruptcy; it was used for the purpose of paying in moneys received by the defendant and paying his liabilities, and the judge found as a fact that the wife operated upon it merely as the defendant's agent.

Cannot for the plaintiff. As the cheques were given in respect of betting transactions they are by virtue of s. 1 of the Gaming Act, 1835, deemed to have been given for an illegal consideration, and s. 2 of the Act enables the plaintiff as the drawer, who has actually paid the indorsee of the cheques, to recover the amount represented by them from the defendant as the original payee: *Gilpin* v. *Clutterbuck* (2); *Lynn* v. *Bell* (3); *Nicholls* v. *Evans* (4); and *Golding* v. *Bradlaw*. (5) The defendant's wife was either the "indorsee" or the "holder" of the cheques within s. 2.

Martin O'Connor for the defendant. The banking account into which the cheques were paid, although in the defendant's wife's name, was really the account of the defendant himself; there was no independent indorsee or holder of the cheques such as is contemplated by s. 2. Channell J. in *Nicholls* v. *Evans* (4) took the view that the indorsee or holder, within s. 2 must have a title distinct from that of the payee, and in this case the defendant's wife had no title to the cheques distinct from that of the defendant. The plaintiff is not therefore entitled to recover.

Cannot in reply. Whatever the arrangement between the defendant and his wife as to the banking account was is immaterial for this purpose. The wife was in fact the indorsee or holder of the cheques, and that is sufficient to bring the

(1) The section is set out in the headnote.
(2) (1849) 13 L. T. (O. S.) 71.
(3) Ir. R. 10 C. L. 487.
(4) [1914] 1 K. B. 118.
(5) Ante, p. 238.

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case within s. 2. *Golding* v. *Bradlaw* (1) is directly in point. There Bray J. held that where payment of a cheque given for bets has been made to any indorsee the drawer is entitled to recover from the original payee.

AVORY J. stated the facts and continued: Having found as a fact that the banking account kept in the defendant's wife's name was kept and operated by her as the defendant's agent, I have now to consider whether the plaintiff is a person who has drawn a bill for a consideration on account of which it is declared to be void, and has actually paid any indorsee, holder, or assignee of the bill. That a cheque is a bill within s. 2 of the Gaming Act, 1835, was decided in *Lynn* v. *Bell* (2), and is now indeed clear by s. 73 of the Bills of Exchange Act, 1882; and that the cheques were given for a consideration on account of which they have been declared to be void is clear as, admittedly, they were given in settlement of racing bets. But has the plaintiff actually paid to any indorsee, holder or assignee of the cheques the money thereby secured? If he has, the money so paid is by s. 2 of the Act to be deemed and taken to have been paid for and on account of the person to whom the cheques were originally given upon an illegal consideration. Mr. O'Connor is, I think, right in saying that the Act requires or contemplates that payment shall be made to some independent third party, some person who is not the same person as the original payee. In this case I think the defendant's wife was for this purpose the defendant under another name; that the defendant was —I do not use the expression offensively—disguising himself under his wife's name. I therefore think that the wife was not an independent third party, assuming for the moment that she became an indorsee or holder of the cheques. In a sense no doubt she became the indorsee inasmuch as there was a blank indorsement on the cheques, and in a sense she became the holder of the cheques inasmuch as they were delivered to the bankers who were her agents to receive them and who did receive them on her behalf; but I do not think

(1) Ante, p. 238. (2) Ir. R. 10 C. L. 493.

she was an indorsee or holder of the cheques within the meaning of s. 2 of the Act of 1835. None of the authorities cited compels me to hold that she was; and certainly none of them compels me to hold that she was an independent indorsee or holder such as the section contemplates.

In *Lynn* v. *Bell* (1) it was found as a fact that of the three cheques which had been paid to the defendant Bell the first and second were indorsed by him, and also by third parties, bona fide holders for value, who cashed them; the last was indorsed by Bell alone and was cashed by a person who received it from him in payment of losses on a betting transaction; so that all three cheques were cashed by independent parties. In giving judgment Palles C.B. said (2): "The next question is, whether the payment by the plaintiff's banker was a payment by him, within the meaning of the statute. I think it was. The statute was for the benefit of transferees only. It was not intended to alter the rights and liabilities, inter se, of the parties by whom, and to whom, such securities were given. Prima facie, therefore, the right of the person giving the security, to recover from the person to whom such security was given, ought to extend to every case in which, by operation of the statute, the person giving the security was subjected to liability to the indorsee. The words of the statute carry out this object. To entitle the person who has given the security to recover, no more is required than that he should actually pay to an indorsee or holder." There the Chief Baron, in speaking of the person giving the security being subjected to liability to the indorsee, clearly contemplated an independent person to whom there was an independent liability.

In *Golding* v. *Bradlaw* (3), Bray J. was dealing with a case where cheques were made payable to the defendant or his order and were indorsed by him to one Lee who gave cash for them. It is true that Bray J. found that Lee knew that the cheques indorsed to him had been given in payment of bets, but that does not affect the fact that there was an actual

(1) Ir. R. 10 C. L. 487. (2) Ir. R. 10 C. L. 493.
(3) Ante, p. 238.

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indorsement to an independent third person and that that third person actually cashed the cheques by presenting them to the plaintiff's bankers. In those circumstances Bray J. said (1): "The plaintiff did actually pay to Lee the amount of the money secured by the three cheques," and, after pointing out that the Gaming Act, 1835, is not limited to the case of an indorsee taking the cheques for valuable consideration without notice, he added: "The object . . . . was this: the person who lost the bet was not to be affected or to be injured by s. 1, and therefore it was provided that in case the loser of the bet should have to pay to an indorsee the amount of a bill given to the winner of the bet in payment of the bet he should have a remedy over against the winner of the bet, if in fact the cheque had been paid by the loser." The fact that in that case there was an independent third person who had actually cashed the cheques, distinguishes it from the present case.

The present case is more like *Nicholls* v. *Evans*. (2) There the plaintiff, in payment of certain racing bets, gave the defendant five cheques for the amount. The cheques were made payable to the defendant or order and crossed, and were paid by the defendant into his bank. There was no evidence that the defendant's banking account was overdrawn. It was contended that as soon as the cheques were handed to the defendant he became the "holder" within s. 2. Channell J. rejected this contention, and as there was no evidence that the defendant's account was overdrawn he held that the bankers were not "indorsees" but were simply acting as agents for the defendant in collecting the cheques. Channell J. said this, which seems to me very cogent reasoning: "If a person makes a bet and, having lost, pays it in cash he cannot recover it back. That, I think, is agreed. If that is the case, it seems somewhat ridiculous that the fact that the bet is paid, not in cash, but by the machinery of a cheque, should make any difference. It seems to me that where the cheque is the mere machinery of payment the position between the parties is exactly the same as if the money had been paid in

(1) Ante, p. 241. (2) [1914] 1 K. B. 118, 120.

cash." Then, referring to s. 2 he says that "it distinguishes between an indorsee, holder, or assignee on the one hand and the person to whom the bill or note was originally given on the other hand; and the 'holder' therefore means a holder who derives his title from the person to whom the bill or note was given—a person with a distinct title from the original payee just as an indorsee or an assignee clearly has a distinct title." In the present case I do not think it can properly be said that the defendant's wife had a title distinct from that of the original payee. Channell J. added, "If . . . . the cheque gets into the hands of an innocent indorsee the drawer can be compelled to pay that indorsee, but as between himself and the payee of the cheque he ought to be in the same position as if the transaction were incomplete. But if, as I have said, the payee has been paid, there is no conceivable reason why the drawer should recover back the amount." The banker there was held not to be an indorsee, holder, or assignee within s. 2, and I think it follows that the defendant's wife in this case was not an indorsee, holder, or assignee of the cheques within the meaning of the section. For these reasons the claim fails and there must be judgment for the defendant.

Judgment for defendant.

Solicitors for plaintiff: *Percy Bono & Co.*
Solicitors for defendant: *Edmund O'Connor & Co.*

J. S. H.

1919
July 14.

[IN THE COURT OF CRIMINAL APPEAL.]

REX *v.* OXLADE.

Criminal Law—Sentence—Modified Borstal System.

In sentencing a prisoner between the ages of 16 and 21 who for any reason cannot be sent to a Borstal institution, the judge ought not to impose a sentence for a longer term than is appropriate in the particular case in order that the prisoner may get the benefit of the modified Borstal system as it is administered in prison.

APPEAL against sentence.

The appellant pleaded guilty at Middlesex Sessions to indictments for housebreaking and attempted burglary. The chairman had a report before him from the governor of the prison to the effect that the appellant, who was nineteen years of age and had a paralysed arm, was medically unfit for full Borstal treatment; the chairman thereupon sentenced the appellant to imprisonment for two years with a recommendation that he be treated according to the modified Borstal system.

The appellant in person.

Sir Archibald Bodkin (*Turrell* with him) for the Crown. The guidance of the Court is desired as to the proper sentence in cases of this kind, particularly on the question whether the judge at the trial is entitled, in the case of an offender who for some reason cannot be sent to a Borstal institution, to impose a longer sentence than would otherwise be imposed in order that the offender may receive the benefit of the modified Borstal treatment in prison. See *Rex* v. *Smith*. (1) A report on this subject having special reference to the present appellant has been prepared by Sir Evelyn Ruggles-Brise, the Chairman of the Prison Commission.

The report in question was then read. It stated that there was no statutory authority for sentence under the modified Borstal system, that system being only an administrative

(1) (1913) 9 Cr. App. R 117.

arrangement for giving effect to statutory rules of August 3, 1909, for the special treatment of prisoners between the ages of 16 and 21. It was called the "modified" Borstal system to emphasize the distinction between the treatment of prisoners between those ages and that of ordinary prisoners. Borstal committees are established at all prisons to watch over the operation of these rules and to provide for the discharge of young prisoners on lines analogous to those followed by the Borstal Association in the case of "full" Borstal sentences. Apart from the operation of the special rules, the system does not differ from that of ordinary imprisonment, except that remission does not necessarily apply. The object of this was to give some hold to the prison authorities and Borstal committees on a wayward young prisoner who showed no disposition towards amendment, and only looked forward to his discharge when he had earned a sufficiency of marks. The Secretary of State however had agreed, when nine months or more of a sentence had been served, to consider carefully any recommendation by the Borstal committee with a view to special remission under the Royal prerogative. The Prison Commissioners, who deprecated a succession of very short sentences, suggested that it would be better to give a sentence which would admit of healthy influences operating as in a collecting centre—i.e., a sentence of three months or over. With regard to the present case the fact that the appellant was stated to be medically unfit no doubt influenced the Chairman of Quarter Sessions in thinking that he could not be recommended for the "full" Borstal sentence. Since 1915 however arrangements had been made for committing for full Borstal treatment prisoners who from physical causes might not be capable of strenuous work, drill exercise, etc., as a part of the system, and the Commissioners would probably have decided that the affection of the appellant's arm was not a sufficient reason for excluding him from full Borstal treatment, but they would have decided that, in view of his previous good character and the fact that this was his first conviction, he was not a suitable case for Borstal detention.

Sir Evelyn Ruggles-Brise was called and gave evidence in

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amplification of his report. He stated that lads between the ages of 16 and 21 who were sentenced to three months or longer were segregated in a collecting station and taught a trade in order that they might have a better chance of getting their living honestly when they came out of prison.

The judgment of the Court (Earl of Reading C.J. and Shearman and Roche JJ.) was delivered by

EARL OF READING C.J. In this case a report was made to the Chairman of Quarter Sessions that the appellant, who is 19 years of age, was medically unfit for full Borstal treatment, the reason being that one of his arms is paralysed. In view of that fact the Chairman sentenced the appellant to two years' imprisonment with a recommendation that he should be treated according to the modified Borstal system. Evidence was given by the police that the appellant had a good character till the early part of this year, which was of itself a sufficient justification for the conclusion that he was not a fit person to send to a Borstal institution. No doubt the Chairman in imposing the sentence desired that the appellant should have the benefit of discipline and education for a trade which can be given if the detention is for a sufficiently long period to make it at least more probable that when he came out of prison he would no longer associate with thieves or other criminals. It was sought in this way to get indirectly the benefit of the full Borstal treatment.

In dealing with juvenile criminals it is eminently desirable that care should be taken to fit them, as far as human ingenuity can do so, for a better life when they come out of prison, and it was with this object that the Borstal system of treatment was devised. Nevertheless it was found to be necessary to have offenders certified as fit from the medical point of view for the Borstal system.

In 1915, however, as we now know from the memorandum which Sir Evelyn Ruggles-Brise, the Chairman of the Prison Commission, has placed before us, and from the evidence he has given in amplification of his report, a system was adopted by which the rigidity of the rule as to physical

unfitness has been relaxed. Although a lad must be capable of doing, or being taught to do, a full day's work by which he may earn a living, it is not now necessary, under the regulation of 1915, that he should be fit for gymnastics and heavy manual labour; it is, as the Commissioners point out, sufficient if he is fit for modified drill, etc. Certain physical defects do not now exclude a lad from receiving the treatment of the Borstal system, and in the present case, therefore, the fact that one of the appellant's arms is paralysed would not, in Sir Evelyn Ruggles-Brise's opinion, be sufficient to exclude him from that treatment. The other reason to which I have already referred—namely, that the appellant is not shown to be of criminal tendencies—would, however, exclude him. The question therefore is, what should be done with him. In our view, when a sentence is passed upon a lad between the ages of 16 and 21 the Court ought not to sentence him to a longer term of imprisonment than is appropriate in the particular case in order that he may get indirectly the benefit of the Borstal system as administered in our prisons. We are told that in an ordinary prison a juvenile between the ages of 16 and 21 is dealt with in a special way, whatever the sentence, and if his sentence exceeds three months he is segregated with other lads in a collecting station where he has the advantage of learning a trade; if the sentence is for less than three months the authorities think it useless to follow this practice to the same extent although they give the lad the benefit of the treatment as far as is practicable. The Court is glad to know that this care is taken of juvenile offenders, and is not surprised to learn that the Prison Commissioners devote so much thought and attention to giving lads a better chance after leaving the prison; but that fact, important as it is, does not in our opinion justify the sentence that was pronounced in this case, which must be regarded simply as two years in prison. The fact that the appellant would get the benefit of the modified Borstal treatment does not justify the Court in imposing a longer sentence than would otherwise be imposed. In our opinion the proper sentence in this case is one of six months' imprison-

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ment during which the appellant will be dealt with in the way that has been mentioned. We desire to add that we hope that the proposal to institute an establishment for dealing specially with physically defective cases, which we are told the Prison Commissioners entertained before the war, may now be carried into effect. We further desire to say that when circulars or regulations are prepared for the purpose of explaining matters of this kind they should be sent to all those who are concerned with the imposition or the revision of sentences. That has not always been done hitherto. If it is done we shall not find so many different Courts taking contradictory views on sentences.

Sentence reduced.

Solicitor for the Crown : *Director of Public Prosecutions.*

J. S. H.

1919

July 23.

HUDSON'S BAY COMPANY, APPELLANTS v. THEW (SURVEYOR OF TAXES), RESPONDENT.

THEW (SURVEYOR OF TAXES), APPELLANT v. HUDSON'S BAY COMPANY, RESPONDENTS.

Revenue—Income Tax—"Income arising from Securities"—Rent—Sale of Land—Payment by Instalments—Interest on Instalments—Finance Act, 1914 (4 & 5 *Geo.* 5, *c.* 10), *s.* 5.

A company owning land in Canada sold plots of land on the terms of a written agreement under seal by which the purchaser covenanted to pay a specified part of the price immediately and the residue by equal annual instalments, and with each instalment to pay interest on the balance of the purchase money remaining unpaid. On default being made in the payments the company had power to re-enter and re-sell the land:—

Held, that the interest was income arising from a security within s. 5 of the Finance Act, 1914.

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

AT a Meeting of the Commissioners for the Special Purposes

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of the Income Tax Acts held on April 26, 1918, for the purpose of hearing appeals, the Hudson's Bay Company of 1, Lime Street, City of London (hereinafter called "the Company"), appealed against certain additional first assessments to income tax made upon it for the years ending April 5, 1915, 1916, 1917 and 1918, under the provisions of the Income Tax Acts in respect of the profits accruing to it outside the United Kingdom.

No question was required to be decided in this case as to the amount of the profit in respect of which the assessments were made: the only question upon which the opinion of the Court was desired was the question whether the profits were of such a kind as to fall within s. 5 of the Finance Act, 1914. (1)

The company was owner of large tracts of land in Canada, and from time to time sold plots of land to purchasers desiring to take up and occupy land for settlement in that country. The practice in the case of sales, where the purchaser was unable to provide the whole purchase money in one sum, was as follows. The price of the land to be sold having been agreed, the purchaser entered into a written agreement under seal with the company whereby he on the one part agreed to pay on or before the execution of the agreement such part of the purchase money as might have been agreed to be immediately payable, covenanting to pay the remainder by equal annual instalments, each with interest calculated on the balance of the purchase money remaining unpaid, and the company on the other part agreed to allow the purchaser to occupy the land until default was made in payment of the sums agreed to be paid, and to convey the land to the purchaser within a reasonable time after all the instalments with the interest thereon were paid. The company reserved to itself the right if the payments were not punctually made by the purchaser to cancel the agreement and re-enter upon or resell the

(1) Finance Act, 1914 (4 & 5 Geo. 5, c. 10), s. 5: "Income tax in respect of income arising from securities, stocks, shares, or rents in any place out of the United Kingdom shall, notwithstanding anything in the rules under the fourth and fifth case in s. 100 of the Income Tax Act, 1842, be computed on the full amount of the income, whether the income has been or will be received in the United Kingdom or not . . . . . "

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lands, all payments theretofore made being forfeited to the company.

In these circumstances counsel on behalf of the company contended that the sums described as interest in the agreement referred to were not " income arising from securities " or from " rents " within the meaning of s. 5 of the Finance Act, 1914.

The Surveyor of Taxes contended, inter alia, that he was entitled to a decision that the interest provided for under the agreements was " income arising from securities " within s. 5, and, alternatively, that if he was not entitled to that decision he was entitled to one that the interest was income from " rents " within the meaning of s. 5.

The Special Commissioners did not decide whether the payments described as " interest " were " income from securities," but they decided that the payments were " income from rents " within the meaning of s. 5, and they fixed the assessments accordingly to include the sums referred to in the full amounts accruing from year to year. Both the company and the Surveyor of Taxes declared their dissatisfaction with the decision as being erroneous in point of law.

Sir John Simon K.C. and *T. T. Paine* for the company. These payments are neither income from securities nor from rent. It was decided in *Stevens* v. *Hudson Bay Co.* (1) that the sums received by the company from sales of their lands are capital, not income. The transaction is a capital transaction. There is a sale of land at a price, which is calculated by determining, first, what the sum will be if the money is paid down ; if the payment is deferred that sum is increased by an amount equal to the interest on the unpaid instalments, but the whole sum received by the company is a capital sum. The so-called interest is part of the price. It is not income from a security. There is no security for the interest as distinguished from the unpaid balance of the purchase money.

Sir Gordon Hewart A.-G., *T. H. Parr* and *R. P. Hills* for the Surveyor of Taxes, were not called upon to argue.

ROWLATT J. The point raised by this case seems to me a

(1) (1909) 101 L. T. 96.

very simple one. The appellants sell land, the purchase price is paid by instalments, and with each instalment there is a payment of interest on the outstanding balance of the purchase money. The question is whether that interest is income arising from a security within s. 5 of the Finance Act, 1914. The company has no security on the land for the interest, but can re-enter if default is made in the payment of the instalments. The Court of Appeal has decided that the money received by the company from the sale of its lands is not income but capital, and it is contended that this interest also is capital. The position is that the purchaser remains the debtor of the company for the unpaid balance of the purchase money, and until that balance is paid he pays interest upon it. I cannot see how it can be said that that interest is not income. Then is it income arising from a security? It has for a long time been thought, and it has now been decided, that stocks and shares are not securities but possessions. But in this case the interest is paid by virtue of a covenant entered into by the purchaser. It is said that a covenant is not a security unless it is fortified by some real asset. If that were so, the public debt of Canada would not be a security. In my opinion the covenants of the purchasers on these sales are just as much securities as is the covenant of a Government or a corporation. I therefore hold that this interest is income arising from a security within s. 5. It is not rent, and therefore under s. 59 of the Taxes Management Act, 1880, I amend the determination of the Special Commissioners by substituting "income arising from securities" for "income arising from rent."

Appeal of the Company dismissed.

Solicitors for Company: *Paines, Blyth & Huxtable.*
Solicitor for Surveyor of Taxes: *Solicitor of Inland Revenue.*

F. O. R.

1919
July 21.

ATTORNEY-GENERAL *v.* SOUTH WALES ELECTRICAL POWER DISTRIBUTION COMPANY.

Revenue—Stamp Duty—Company—Payment of Debenture Interest—Issue of deferred Warrants—Issue of Capital—"Funded Loan"—Finance Act, 1899 (62 *&* 63 *Vict. c.* 9), *s.* 8.

A company under the powers of a special Act issued from time to time "deferred warrants" in payment of the interest on the company's debenture stock. The warrants bore interest and were repayable, both as to principal and interest, after a certain date out of the first available funds of the company :—

Held, that this was not the creation of a "funded debt" or an issue of "loan capital" within s. 8 of the Finance Act, 1899, and that the company were not liable to the duties imposed by that Act.

SPECIAL CASE stated by consent in an action by the Attorney-General as informant, claiming duty and penalties under s. 8 of the Finance Act, 1899. (1)

The defendant company were incorporated by the South Wales Electrical Power Distribution Company Act, 1900 (hereinafter called the Act of 1900), and are and have at all material times been a company formed and established in the United Kingdom.

By the South Wales Electrical Power Distribution Company Act, 1906 (hereinafter called the Act of 1906), after reciting,

(1) Finance Act, 1899 (62 & 63 Vict. c. 9), s. 8: "(1.) Where any local authority, corporation, company, or body of persons formed or established in the United Kingdom propose to issue any loan capital, they shall, before the issue thereof, deliver to the Commissioners a statement of the amount proposed to be secured by the issue.

"(2.) Subject to the provisions of this section every such statement shall be charged with an ad valorem stamp duty. . . . .

"(5.) In this section the expression 'loan capital' means any debenture stock, county stock, corporation stock, municipal stock, or funded debt, by whatever name known, or any capital raised by any local authority, corporation, company, or body of persons formed or established in the United Kingdom, which is borrowed, or has the character of borrowed money, whether it is in the form of stock or in any other form, but does not include any county council or municipal corporation bills repayable not later than twelve months from their date or any overdraft at the bank or other loan raised for a merely temporary purpose for a period not exceeding twelve months. . . . ."

inter alia, that the defendant company had issued debenture stock for 200,000*l.* and that the holders of more than three-fourths in value of the existing debenture stock of the company had consented in writing to the priority given by the said Act to the money to be borrowed under the authority of the said Act and also to the postponement of the interest on the existing debenture stock (such consents having in fact been so given) it was by the material parts of ss. 10, 11 and 29 enacted as follows :—

Sect. 10 : "The company may in addition to all sums authorised to be raised by the Act of 1900 create and issue prior lien debenture stock which shall both as to principal and interest be a first charge in priority to any mortgages debentures or debenture stock issued or to be issued and the interest thereon upon the general undertaking of the company provided that it shall not operate as a charge on superfluous land of the company when sold or affect any specific charge on such lands.

"The prior lien debenture stock shall not exceed in amount five hundred thousand pounds and shall bear interest at a rate not exceeding five pounds per centum per annum payable half-yearly.

"The prior lien debenture stock may be issued on the terms that it shall be redeemable at the option of the company at such premium if any and at such date or dates and in such manner as the directors may at the time of issue determine."

Sect. 11 : "In the event of the company creating and issuing prior lien debenture stock . . . . the interest on the existing two hundred thousand pounds five per centum debenture stock issued by the company shall not for a period of three years from January 1, 1906, be payable in cash but shall be paid and satisfied by the issue by the company to the holders of such debenture stock half-yearly on the dates on which the payment of such interest accrues due of deferred warrants for the amount of such interest such warrants themselves carrying interest at the rate of five per centum per annum and being payable both as to the principal and interest thereof out of the first available funds of the company after January 1,

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THE ATTORNEY-GENERAL v. SOUTH WALES ELECTRICAL POWER DISTRIBUTION COMPANY.

1909, subject to prior payment thereout of all interest on the said prior lien debenture stock and of the current interest on the said two hundred thousand pounds debenture stock and of all other fixed charges of the company."

Sect. 29: "The company may for the purposes of or in connexion with their business borrow moneys on temporary loans from their bankers by means of overdrafts or otherwise and may draw accept and endorse bills of exchange or other negotiable instruments."

Between August, 1906, and April, 1907, prior lien debenture stock to the amount of 1552*l.* was created and issued in accordance with s. 10 of the Act of 1906. Such stock was issued upon the terms that it might be redeemable at the price of 105*l.* per centum at the option of the company upon giving six months' notice any time after December 31, 1916, and subsequently the terms of redemption of the said stock were modified by the provisions of s. 3, sub-ss. 9 (*b*) and (*c*) and 10 of the South Wales Electrical Power Distribution Company Act, 1908 (hereinafter called the Act of 1908).

By s. 23 of the Act of 1908 it was enacted as follows:—

"(1.) Sect. 11 (Postponement of interest on existing debenture stock) of the Act of 1906 shall be amended by substituting the words 'period of four years' for the words 'period of three years' and by substituting the words 'one thousand nine hundred and ten' for the words 'one thousand nine hundred and nine.'

"(2.) The said s. 11 as so amended shall apply to all deferred warrants already issued."

From January 1, 1906, to January 1, 1916, no interest on the 200,000*l.* five per cent. debenture stock was paid in cash to the holders thereof, but the interest was paid and satisfied by the issue by the defendant company to the holders of the debenture stock half yearly from July 1, 1906, to July 1, 1915, on the dates on which the payment of such interest accrued due of deferred warrants for the amount of such interest less income tax, such warrants themselves carrying interest at the rate of five per cent. per annum. These deferred warrants were issued under the provisions of the Acts of 1906 and 1908.

The deferred warrants were issued in three forms, marked respectively A, B and C. The said forms were form A, from January 1, 1906, to July 1, 1908; form B, from January 1, 1909, to January 1, 1910; form C, from July 1, 1910, to July 1, 1915.

Form A was as follows:—

"D. No.....

No.....

Debenture Stock Certificate Deferred warrant to bearer for interest on debenture stock issued pursuant to section 11 of the South Wales Electrical Power Distribution Company's Act, 1906, payable both as to principal and interest out of the first available funds of the Company after January 1, 1909, subject to the prior payments thereout of all interest on so much of the 500,000*l.* prior lien debenture stock authorised by the said Act as may for the time being have been issued and be outstanding and of the current interest on 200,000*l.* debenture stock and of all other fixed charges of the Company.

"For *l.* being interest less income tax for the half year ending December 1, 1897, upon *l.* debenture stock payable as above mentioned to the bearer hereof on or after January 1, 1909, at the office of the Company, Royal Chambers, Queen Street, Cardiff.

"The amount of this warrant carries interest payable as abovementioned at the rate of five per cent. per annum (less income tax) from January 1, 1908, until the date of payment.

"Due notice will be given by advertisement in the *Times* newspaper as soon as the funds of the company are available for the payment of this warrant.

Secretary."

Forms B and C were in the same terms save that form B was expressed to be issued pursuant to s. 23 of the Act of 1908 as well as s. 11 of the Act of 1906, and form C did not refer to either section.

The defendant company did not before the issue of any of the deferred warrants deliver to the Commissioners of Inland Revenue any statement of a proposed issue of loan capital or of the amount proposed to be secured by such issue, nor

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have they paid any duty thereon under s. 8 of the Finance Act, 1899.

Each deferred warrant was impressed with a penny stamp at the date of its issue. Save as aforesaid the defendant company have not paid any stamp duty in respect of the issue of any of the deferred warrants.

The questions for the opinion of the Court were:—

1. Whether the defendant company in respect of the issue by them from time to time of any of the above-mentioned deferred warrants proposed to issue or issued any loan capital within the meaning of s. 8 of the Finance Act, 1899, and if so to what amount?

2. Whether before any issue a statement of a proposed issue of loan capital or of the amount proposed to be secured by the issue was deliverable by the defendant company to the Commissioners of Inland Revenue under s. 8, sub-s. 1, of the Finance Act, 1899, and, if so, of what amount?

3. Whether the defendant company were liable to pay the duties and penalties claimed or any and what part thereof?

Sir Gordon Hewart A.-G. (*T. H. Parr* and *R. P. Hills* with him) for the plaintiff. The issue of the deferred warrants is an issue of loan capital within the meaning of s. 8 of the Finance Act, 1899. An issue of loan capital does not necessarily involve an increase of capital: *Attorney-General* v. *Regent's Canal and Dock Co.* (1); *London and India Docks Co.* v. *Attorney-General.* (2) In the present case the creditors of the company for debenture interest, instead of being paid cash, received these deferred warrants which created new rights. The debt for interest was converted into a principal debt, bearing interest. It became a "funded debt" and it also had "the character of borrowed money" within the definition of loan capital in sub-s. 5 of s. 8.

Holman Gregory K.C. and *Hon. Trevor Lewis* for the defendant company. The issue of the deferred warrants did not increase the capital of the company or substitute something for a part of that capital. The warrants are merely an acknow-

(1) [1904] 1 K. B. 263. (2) [1909] A. C. 7.

ledgment of a debt with a promise to pay that debt at a future date, not out of capital but out of revenue, with interest. There has been no borrowing and no loan, and s. 8 has no application to this case. The expression "funded debt" means the capitalization of a floating debt.

T. H. Parr replied.

ROWLATT J. In this case the facts lie in a very small compass and the point is a narrow one, but not free from difficulty. The defendant company had a debenture issue. They did not see their way to pay interest on the debentures in the future, and they issued under statutory authority prior lien debentures which took the place of their existing debts and they also obtained statutory power to issue deferred warrants in payment of the interest on the original debenture issue. The deferred warrants themselves bore interest, and were payable as to principal and interest out of the first available funds of the company, subject to the prior payment of interest on the prior lien debenture stock. The company issued three series of these deferred warrants, the first under the company's Act of 1906, the second under that Act and the Act of 1908, which extended the company's powers. The third series was issued without statutory authority and amounted to an obligation undertaken by virtue of their inherent powers.

The question is whether the company by issuing these deferred warrants have incurred a liability in respect of an issue of "loan capital" within s. 8 of the Finance Act, 1899. It is clear from *Attorney-General* v. *Regent's Canal and Dock Co.* (1) that in order to attract this duty on loan capital it is not necessary that the transaction should be one which adds to the resources of the company. But it is said that this particular issue does not come within any of the words defining loan capital in sub-s. 5 of s. 8. The contention on behalf of the Crown is that it comes within the words "funded debt" in that sub-section. It is not easy to give an exhaustive definition of "funded debt." The expression is most often used in connection with national or municipal issues, where a liability

(1) [1904] 1 K. B. 263.

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for interest or for a short term floating debt is converted into a long term debt bearing interest. When one is dealing with a transaction of that description it is immaterial to consider whether the original debt which thus becomes "funded" resulted from a liability for interest or from any other liability, nor would one have to consider what was done with the money which was raised in this way. In my opinion a long term debt is a "funded debt." But when it is sought to apply the term "funded debt" to a transaction of a company like the defendant company, a difficulty arises. I do not think that the origin of the debt is a material consideration, and the fact that the issue owed its existence to a default in the payment of debenture interest would not, in my opinion, prevent the company from converting the debt into a funded debt. But, under this scheme, the debt in question, both principal and interest, is payable out of the revenue of the company, so long as the company is a going concern. I have come to the conclusion that that fact prevents it from being a funded debt. The transaction really amounts to this, that the company have given an acknowledgment that the interest on their debentures is unpaid, leaving the remedy as it previously existed, but adding an obligation to pay interest on that interest so long as it remains unpaid. By merely postponing payment of the interest, and issuing a warrant which shows the stock-holder what his rights are, the company have not, in my opinion, created a funded debt.

The Attorney-General referred to the words in sub-s. 5: "or any capital raised .... which is borrowed or has the character of borrowed money," but I cannot see how it can be said, when all that has been done is to give an acknowledgment of indebtedness for interest, that capital has been raised. I therefore give judgment for the defendant company.

Judgment for defendant company.

Solicitor for plaintiff: *Solicitor of Inland Revenue.*

Solicitors for defendant company: *Vizard, Oldham, Crowder & Cash, for Spencers & Evans, Cardiff.*

F. O. R.

WILSON SHIPPING CO., LIMITED *v.* BRITISH AND FOREIGN INSURANCE CO., LIMITED.

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July 28, 29, 30.

[1919 W. 572.]

Insurance (Marine)—Partial Loss—Damage unrepaired—Subsequent total Loss during the Currency of Policy—Merger.

By a time policy the plaintiffs insured their vessel with the defendants against marine risks only, but including particular average. The vessel was under charter to the Admiralty on the T. 99 form under which the Admiralty contracted to pay for loss by war risk, the value to be ascertained at the date of the loss. During the currency of the policy the vessel sustained damage by marine risks; the damage was not repaired but it depreciated her value by 1770*l.* On a subsequent voyage, but during the currency of the policy, the vessel became a total loss by war perils, and the Admiralty in consequence of the unrepaired damage paid the defendants 1770*l.* less than they would otherwise have done. The plaintiffs claimed to recover from the defendants their proportion of the 1770*l*:—

Held, that as the unrepaired damage was followed by a total loss during the currency of the same policy the smaller loss merged in the larger, and therefore the defendants were not liable for the unrepaired damage notwithstanding the fact that the liability for the total loss did not fall upon them.

ACTION tried by Bailhache J. as a commercial cause.

The plaintiffs, the owners of the s.s. *Eastlands*, claimed to recover from the defendants their proportion of the sum of 1770*l.*, being the amount deducted by the Admiralty in paying the plaintiffs for the total loss of the vessel by submarine attack on January 25, 1918.

At the date of her loss the *Eastlands* was insured with the defendants against marine risks only, but including particular average, under a time policy dated March 16, 1917, for twelve calendar months from February 20, 1917. Attached to the policy were the Institute Time Hull clauses one of which provided that "in no case shall underwriters be liable for unrepaired damage in addition to a subsequent total loss sustained during the term covered by this policy."

The *Eastlands* was under charter to the Admiralty on the T. 99 form, under which the Admiralty contracted to pay for

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the loss by war risks of steamers chartered to them, the value to be ascertained at the date of the loss.

During the currency of the policy but on a voyage before that on which the *Eastlands* was totally lost she sustained damage by marine perils. The damage was not repaired but it depreciated her value at the date of her loss by the sum of 1770*l.* The Admiralty accordingly paid the plaintiffs 1770*l.* less than they otherwise would have done, and the plaintiffs contended that the underwriters must make this sum good. The defendants contended that they were not liable to pay for damage to a vessel if before repair the damage was followed by a total loss during the currency of the same policy.

R. A. Wright K.C. and *Jowitt* for the plaintiffs. On the conclusion of the voyage on which the damage occurred the plaintiffs had a vested cause of action on the policy in respect of that damage (Marine Insurance Act, 1906, s. 69); and the underwriters' liability is not affected by the fact that the ship became a total loss on a subsequent voyage. Sect. 77, sub-s. 2, of the Act and the Institute clause do not afford a defence to this action, for they only apply where the unrepaired damage and the subsequent total loss are covered by the same policy, which is not the case here. In *Livie* v. *Janson* (1) it was held that where unrepaired damage, to which the policy attached, was followed by a total loss caused by an excepted peril occurring on the same voyage, the owner could not recover for the unrepaired damage as it had occasioned no loss to him. But in the present case the total loss occurred on a subsequent voyage and the plaintiffs have been damnified because the cost of the unrepaired damage has been deducted from the value of the ship recoverable under the Admiralty charterparty. The only limitation on the right to recover for successive losses is that imposed by s. 77, sub-s. 2, namely, where under the same policy there is a partial loss followed by a total loss.

[*Lidgett* v. *Secretan* (2) and *Knight* v. *Faith* (3) were also cited.]

(1) (1810) 12 East, 648. (2) (1871) L. R. 6 C. P. 616.
(3) (1850) 15 Q. B. 649.

MacKinnon K.C. and *Claughton Scott* for the defendants.

Sect. 77, sub-s. 2, of the Act only stated part of the law. By s. 91, sub-s. 2, the rules of the common law, save in so far as they are inconsistent with the provisions of the Act, continue to apply to contracts of marine insurance. *Livie* v. *Janson* (1) is still good law as to the position when the subsequent total loss was either due to an excepted peril, as was the case in *Livie* v. *Janson* (1) and in this case, or is covered by a different policy from that which covered the partial loss. In neither case can the owner recover for unrepaired damage. There is no accrued right of action for unrepaired damage until the expiration of the policy, whether it be a voyage policy as in *Livie* v. *Janson* (1), or a time policy as in the present case. If before the expiration of the policy the vessel is totally lost, the value of the unrepaired damage cannot be recovered. The question of the underwriter's liability for the unrepaired damage cannot be affected by the fact that the owner has entered into a contract of indemnity or insurance with a third party the terms of which caused the owner to suffer loss in respect of the unrepaired damage: *Lidgett* v. *Secretan* per Willes J. (2)

R. A. Wright K.C. in reply. It is said for the defendants that unrepaired damage can never found a claim if a total loss occurs during the currency of the same policy. That is not the true view of the position. An underwriter who resists a claim for unrepaired damage must show affirmatively that the unrepaired damage caused no loss to the assured. Here that is not shown. If the risk runs off in such circumstances that the unrepaired damage is a continuing prejudice to the assured he is entitled to recover. There was in this case a continuing prejudice to the plaintiffs.

Cur. adv. vult.

July 30. BAILHACHE J. read his judgment which, after stating the facts set out above, continued as follows: The policy incorporates the Institute Time clauses, one of which runs thus: "In no case shall underwriters be liable for un-

(1) 12 East, 648. (2) L. R. 6 C. P. 623.

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repaired damage in addition to a subsequent total loss sustained during the term covered by this policy." This clause does not protect the defendants, because it is limited to a case where the total loss falls upon underwriters and does not cover a case where the total loss is due to an excepted peril.

The Marine Insurance Act, 1906, deals with the matter in much the same way in s. 77, sub-s. 2, which provides that where under the same policy a partial loss which has not been repaired or otherwise made good is followed by a total loss the assured can only recover in respect of the total loss. Again this does not touch the case where though both losses occur during the currency of the same policy the underwriters are under no liability to pay for the total loss. If the matter rested here there would be considerable reason to infer that where the subsequent total loss did not fall upon the underwriters the earlier partial loss was recoverable from them. The code of 1906, however, by s. 91, sub-s. 2, preserves the common law including the law merchant save in so far as they are inconsistent with its express provisions, and as the code is silent as to what is to happen where the partial loss and the total loss, although occurring during the currency of the same policy, do not fall on the same underwriters, one must see how the law stood before 1906.

The point came before Lord Ellenborough in 1810 in *Livie* v. *Janson*. (1) In that case a ship was insured free from American condemnation. She stranded, sustained damage, was the next day seized by the Americans and afterwards condemned. The owner was not insured against seizure and the total loss fell upon him. Lord Ellenborough held that the underwriters were not liable to pay for the unrepaired stranding damage. He held that the partial loss was merged in the total loss; that the partial loss had done the assured no harm as, having lost his ship, it was a matter of indifference to him what condition she was in when he lost her. The owner was treated as carrying the risk of loss from seizure himself.

In 1871 the matter came again before Willes J. in *Lidgett* v. *Secretan*. (2) In that case a ship sustained damage during

(1) 12 East, 648. (2) L R. 6 C. P. 616.

the currency of one policy and while being repaired was totally destroyed by fire during the currency of another policy. That learned judge held that although the repairs were not completed the underwriters on the first policy were liable to the full extent of the depreciation in the ship's value, notwithstanding the fact that she was shortly afterwards a total loss. Willes J. threw no doubt on *Livie* v. *Janson* (1), but he said the period at which the liability of the underwriters on the first policy is to be determined is at the expiration of the first risk. Therefore it is right that he should be held liable for the sum which he ought to have paid at that time, which would be the diminution in value of the vessel by reason of the damage which she had sustained.

This statement of the law is preserved in the code, which expressly limits the underwriter's immunity from liability for a partial loss to the case where the total loss occurs during the currency of the same policy, but the old law gave a wider immunity than the code in that it was immaterial whether the total loss occurring during the currency of the policy fell upon the underwriters or not. This extension is not contrary to any express provision in the code and is in my opinion still the law. I have little doubt that at the present time when the practice is to insure against marine and war risks under different policies marine underwriters could not be called upon to pay for depreciation due to unrepaired damage if during the currency of their policy the ship was lost by striking a mine and the total loss fell upon the war risks policy.

If in this case therefore the plaintiffs had been insured against war risks or had been uninsured I should be of opinion that the defendants were not liable. The plaintiffs were not however precisely in either of these positions. They had not insured but they had a contract of indemnity with the Admiralty against war risks. The difficulty of the case lies in the fact that for the purposes of that contract the value of the *Eastlands* was to be taken as at the time of her loss. That involved taking her depreciation due to her

(1) 12 East, 648.

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unrepaired damage into account, and to that extent the plaintiffs' contract of indemnity was not complete and the unrepaired damage was a continuing prejudice. Does this fact make any difference? Lord Ellenborough based his decision that a partial loss unrepaired merged in a total loss occurring during the currency of the same policy upon the ground that the partial loss was of no interest to the assured, and no doubt upon the facts of *Livie* v. *Janson* (1) that was true. Here it is said that under the special circumstances of this case the partial loss was a continuing prejudice notwithstanding the subsequent total loss, and as the ground upon which *Livie* v. *Janson* (1) was decided does not exist here the principle of merger there laid down does not apply.

Some light is thrown upon the question by the case of *Knight* v. *Faith*. (2) In that case the vessel *Pusey Hall* had sustained serious damage by stranding, and there being no facilities for her repair she was sold by the master. The unrepaired damage was a continuing prejudice and the underwriters were held liable. In that case, however, the Court decided that there had been no total loss, and it would appear gave judgment against the underwriters for the partial loss upon that ground.

Upon a review of the authorities I have come to the conclusion that the law stands thus. Whether an underwriter is or is not liable for unrepaired damage cannot be ascertained until the expiration of the policy. If before the expiration of the policy there is a total loss he is not liable to pay for the earlier unrepaired damage sustained during the currency of the same policy, and it makes no difference whether the total loss falls upon him or is due to an excepted peril against which the owner is insured or uninsured. The true doctrine is that the smaller merges in the larger and the rule is not limited to the ground upon which it was based by Lord Ellenborough, namely, that there was no continuing prejudice. If once the policy has expired so that the underwriter's liability for unrepaired damage has attached, he is liable

(1) 12 East, 648. (2) 15 Q. B. 649.

although the ship may be immediately afterwards totally lost and thus the unrepaired damage be no prejudice to the owner. The question in every case must be, did the total loss happen before the underwriter's liability for the unrepaired damage accrued ? If yes, he is not liable ; if no, he is liable. It would be strange if an underwriter whose liability for unrepaired damage is determined by the loss of the vessel during the insured term by an excepted peril should be worse off if an owner had by contract whether of insurance or charterparty protected himself against nine-tenths of his total loss by the excepted peril than if the owner had not protected himself at all. In my judgment the plaintiffs' position by reason of their charterparty with the Admiralty is an irrelevant circumstance and must be disregarded.

There must be judgment for the defendants.

Judgment for defendants.

Solicitors for plaintiffs : *Downing, Handcock, Middleton & Lewis for Bolam, Middleton & Co., West Hartlepool.*

Solicitors for defendants : *Parker, Garrett & Co.*

J. S. H.

K. B. D.
1918
June 24.

C. A.
1919
March 20, 21.

BURT & COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue — Excess Profits Duty — Liability to Assessment — Exceptions — "Business of any person taking commissions in respect of services rendered" — Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 39.

Sect. 39 of the Finance (No. 2) Act, 1915, provides that that part of the Act which deals with excess profits duty shall apply to all trades or businesses carried on in the United Kingdom or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting (*a*) husbandry in the United Kingdom; (*b*) offices or employments; and (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on, and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount; but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency).

B. and R. were partners in the business of general merchants and commission agents. In the course of their business they acted in this country as secretaries and/or agents for certain Eastern produce companies, being remunerated for their services by a small fixed annual sum, and in addition thereto a commission on sales of produce. The produce was sold by brokers on the instruction of the firm acting upon orders from the companies, the brokers being paid the usual commission on the sales. The firm also acted as expert advisers to one of the companies for a fixed remuneration and a small commission on sales:—

Held that, even if the firm were within either or both of the exceptions (*b*) and (*c*) in s. 39 of the Finance (No. 2) Act, 1915, they were brought back into charge by the concluding words of that section as persons taking commission, or agents whose remuneration did not consist wholly of a fixed and definite sum not depending on the amount of business done or on any other contingency.

Held, therefore, that in computing, for the purposes of excess profits duty, the profits of the business carried on by the firm the sums received by them from the various companies ought not to be deducted.

Decision of Sankey J. affirmed.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

At a meeting of the Commissioners for the Special Purposes of the Income Tax Acts held at York House, Kingsway, London, on March 22, 1917, for the purpose of hearing appeals,

the appellants, Burt & Co., appealed against an assessment to excess profits duty made upon them by the Commissioners of Inland Revenue under 5 & 6 Geo. 5, c. 89, s. 38, sub.-s. 1, and s. 45, sub.-s. 1, in the sum of 1440*l.* 10*s.* in respect of profits arising from a trade or business in the accounting period of twelve months ending December 31, 1914.

The following facts were proved at the hearing of the appeal.

(*a*) The firm of Burt & Co. consisted of two partners, James Lyndon Burt and David George Alexander Reid, and was constituted by a deed of partnership bearing date September 21, 1909, which stated "that the said James Lyndon Burt and David George Alexander Reid hereby mutually covenant and agree to become and be partners in the trade or business of general merchants and commission agents." Clause 10 of the said deed provided that "both partners shall devote their whole time and attention to the partnership business and neither of them shall directly or indirectly be engaged in any other business." On the expiration of the period named in the said deed for the duration of the partnership, i.e., on September 21, 1914, the partnership continued in force under the terms appearing in such deed. In the course of his evidence Mr. Burt stated that the firm had not in fact carried on business as general merchants or commission agents. In making its returns, however, for income tax (Sched. D) purposes since the commencement of the partnership, the firm had described itself, in some years, as "secretaries and produce merchants," in other years as "produce merchants," and in one year as "merchants."

(*b*) Before 1909 Mr. Burt had for 21 years been resident in Java, managing plantations for about 10 years, and during that time had become an expert in all matters connected with the Eastern produce trade generally. Mr. Reid had also resided in Java for several years in connection with the Borneo Company. In 1906 Mr. Burt returned to England. In 1907 he was again in Java but returned to England in 1909, where he had since been ordinarily resident. Mr. Reid returned to England a few years before 1906 and had since been ordinarily resident here. Both partners had visited Java since for a few months.

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(*c*) Subsequent to September 21, 1909, the firm of Burt & Co. were approached by several Eastern produce companies and invited to act as secretaries and/or agents to such companies. The firm accepted the invitations, and had since performed all the usual functions of secretaries and agents of public companies. The office of the firm was used as the registered office of each of the companies, and at that office besides conducting their other business the firm carried out their duties for the companies, the firm employing and paying their own staff for that purpose and paying the rent of the premises. The companies used the office for board meetings. The firm received from each company as remuneration for their services a small fixed annual sum, and in addition thereto in most cases a commission on amounts realized by sale of produce. It was stated in evidence that arrangements on these lines were made by nearly all rubber companies. The produce was not sold by the firm but by brokers in the usual course of trade on the instruction of the firm acting upon orders from the boards of directors. The brokers received the usual commission for sale. The total remuneration received by the firm from this source for the year ended December 31, 1914, was 1539*l.* (net). This sum of 1539*l.* was arrived at by deducting a proportion of the firm's total expenses from the gross receipts from the various companies. Annexed to and forming part of the case was a document containing extracts from the minutes of the meetings of directors of the companies when the resolutions appointing the firm secretaries and/or agents were passed. On all the companies either Mr. Reid or Mr. Burt or both was or were director or directors. In respect of the remuneration (other than the fixed annual sums) received by the firm from the various companies the firm had neither made returns for assessment to, nor paid, income tax under Sched. E of the Income Tax Acts, but such remuneration had been brought into charge by assessments made under Sched. D of such Acts, and duty on such assessments had been paid by the firm.

(*d*) In 1907, while in Java, Mr. Burt arranged with a Mr. Beauclere, a sugar broker in Java, that on his return to

London he would act as an expert adviser to Mr. Beauclere with reference to the European sugar markets. Subsequently he acted also in a similar capacity for the firm of Ross & Taylor of Java. In 1914 he ceased to act for Mr. Beauclere and Messrs. Ross & Taylor, and entered into arrangements with Hwik Hoo Tong, a Chinese company, under which he was to act as their adviser, receiving as remuneration for his services a fixed sum of 100*l.* per annum and a commission of $1\frac{1}{2}$ per cent. on all produce sold by the said company whether in or out of the United Kingdom. This agreement was still in operation. The nature of the advice given by Mr. Burt had reference to the position generally of the world's markets, supply and demand, prospects of crops, etc., and in order efficiently to perform this duty it was necessary for him constantly to keep himself well posted as to the fluctuations of the various markets, and to keep in touch with the leading men in the sugar trade in London, America, and, before the war, Germany. The total remuneration received from this source for the year ended December 31, 1914, was 4198*l.* net. This sum was arrived at by deducting a proportion of the firm's total expenses in the same way as in the case of the sum of 1539*l.* This sum, although generally earned by Mr. Burt, formed part of the income of the firm to be shared with Mr. Reid under the terms of the deed of partnership. Mr. Reid, before he went on active military service, did this work in the absence of Mr Burt from time to time.

(*e*) No capital was required or provided for this business beyond the small amount necessary to meet current expenses.

No question arose as to figures, nor as regards income arising from sources other than those described. It was admitted that this firm carried on other business, the gross receipts from which with the gross receipts from the two above-mentioned sources were included in the profit and loss accounts of the firm.

On the foregoing facts it was contended on behalf of the appellants that so far as regards the income received by them in respect of the several secretaryships and agencies, and of the expert advice given to Hwik Hoo Tong—that is to say the

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sums of 1539*l.* and 4198*l.* before mentioned—they were not liable to payment of excess profits duty being within the exemption granted by s. 39 (*b*) and (*c*) of 5 & 6 Geo. 5, c. 89. (1)

The respondents contended that the appellants were not entitled to exclude the sums of 1539*l.* and 4198*l.* in arriving at the profits of their business.

The Commissioners were of opinion that even if the appellants were within either or both of the exceptions (*b*) and (*c*) contained in s. 39 of the Finance (No. 2) Act, 1915, they were brought back into charge by the concluding words of that section as being persons taking commissions, or agents whose remuneration does not consist wholly of a fixed and definite sum, not depending on the amount of business done or on any other contingency, and they accordingly confirmed the assessment.

The sole point of law arising on the case was whether in computing for excess profits duty purposes the profits of the business carried on by the appellants there should be deducted the profits arising from the two above-mentioned sources.

Sylvain Mayer K.C. and *S. Moses* for the appellants.
Sir F. E. Smith A.-G. and *T. H. Parr* for the Commissioners.

SANKEY J. In this case Messrs. Burt & Co. appeal against an assessment to excess profits duty upon the ground contained in a letter written on September 5, 1916, to the Surveyor

(1) Finance (No. 2) Act, 1915 (5 & 6 Geo. 5, c. 89), s. 39: "The trades and businesses to which this Part of this Act applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

"(*a*) husbandry in the United Kingdom; and

"(*b*) offices or employments; and

"(*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount, but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)."

of Taxes. Their agents in that letter say on their behalf: "We are instructed to appeal against an assessment to excess profits duty in this matter, and we accordingly do so on the ground that in computing the amount of duty assessed the total profits of the trade or business have been assessed without regard being had to the profits included therein from offices and employments and professional work forming part of the trade or business of the firm and which, under s. 39 of the Finance (No. 2) Act, 1915, are not assessable." It will be necessary to refer at somewhat greater length to s. 39 later on in my judgment, but it may be briefly stated that s. 38 of the Finance (No. 2) Act, 1915, imposed a charge of excess profits duty, and s. 39 set out the trades and businesses to which the excess profits duty was made to apply.

Sect. 39 was framed in very wide terms. It provides that "the trades and businesses to which" the excess profits duty "applies are all trades or businesses (whether continuously carried on or not) of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting"—three things: "(*a*) husbandry in the United Kingdom; and (*b*) offices or employments; and (*c*) any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount." But after making those exceptions the section goes on to add "but including the business of any person taking commissions in respect of any transactions or services rendered, and of any agent of any description (not being a commercial traveller, or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)." As I read the case the Commissioners have not decided whether the trade or business of the appellants is an office or employment within (*b*) or whether it is a profession within (*c*). What the Commissioners have decided is that it comes within the words "but including the business of any person taking commissions in respect of

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any transactions or services rendered, and of any agent of any description," and therefore they held that the appellants are persons who have a business in which they take commissions in respect of transactions and services rendered, and that they are agents of a description to which the words in brackets at the end of the section do not apply.

In my view this question is largely one of fact, and therefore it is important to see what exactly is the business carried on by the appellants. The appellant firm consists of two gentlemen, Mr. Burt and Mr. Reid. Both these gentlemen had for many years before they entered into partnership been connected with the East. Mr. Burt had been for 21 years in Java, and Mr. Reid had also resided for several years in Java in connection with the Borneo Company, so both of them were very experienced in Eastern trade questions. They entered into partnership by a deed bearing date September 21, 1909. In that deed it is stated as follows: "The said James Lyndon Burt and David George Alexander Reid hereby mutually covenant and agree to become and be partners in the trade or business of general merchants and commission agents." I therefore start with the fact that these two gentlemen describe themselves in their own deed of partnership as covenanting to carry on the business of general merchants and commission agents, although Mr. Burt in his evidence stated that the firm had not in fact carried on business as general merchants or commission agents. The items which have been returned for excess profits duty and which are in question in the present case, consist of: (1.) an item of 1539*l.*, which may be described as being earned by the partnership as secretaries for certain Eastern produce companies, and (2.) an item of 4198*l.*, which was the remuneration they received for acting for a large Chinese company called the Hwik Hoo Tong, and different considerations arise in regard to those two items.

I will deal first with the item of 1539*l.*, which was received by the partnership as secretaries and agents of public companies. The firm was approached soon after the partners had entered into partnership with an invitation to become secretaries and agents of public companies. They accepted

the invitation, and the terms of their appointment are contained in several resolutions of the companies, which are recorded in the minutes of the various companies for whom they acted. For example, a minute of the Baru (Java) Estates Co. states as follows: "That the appointments of the following were confirmed, secretaries and agents, Burt & Co., 41, Eastcheap, E.C., at a fee of 150*l.* per annum and the usual commission on the sale of produce." Then there is a minute of the Kalidjerock Rubber Co. which is as follows: "It was resolved that Messrs. Burt & Co., the secretaries of the company, receive a remuneration of 150*l.* per annum with the usual commission of 1½ per cent. on the sale of produce." I need only read one other minute, namely, that of the Tjidadap (Java) Plantation Co., Ld., which states: "It was resolved that Messrs. Burt & Co. be appointed agents and secretaries of the company at a salary of 100*l.* per annum to include use of offices." It will be observed that in two of those minutes Messrs. Burt & Co. are appointed as agents, and that in two of those minutes their remuneration is not only a fixed sum per annum but a commission, in one case the usual commission, in another case the usual commission of 1½ per cent. on the sale of produce. In the third case it was a little different. They were authorized to charge the usual commission on all sales of tea 1½ per cent. Now just as in their own deed of partnership they describe themselves as agents of public companies so in the minutes of their appointment by these three companies they are described as agents. It appears to me that in fact the work they did was agency work. The case finds that the office of the partnership is used as the registered office of each of the companies, and at such office besides conducting their own business the firm carry out their duties for the company, the firm employing and paying their own staff for such purposes and paying the rent of the premises.

I have dealt with (1.) the description of themselves in their own deed of partnership; (2.) their description in the various minutes under which they have their appointments; (3.) the fact that they do agency work; and I now turn to the fourth point, the question of commission. The learned counsel who

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argued this case on behalf of the appellants said that the payment over and above the fixed sum was not really a commission but a percentage, and he drew my attention to the fact that the firm did not themselves sell the produce of the companies for whom they acted, but that the produce was sold in the ordinary way by brokers who were instructed by the firm, and he says that this is not really a commission but merely a method of payment upon results. But the case finds this : " The firm receive from each company as remuneration for their services a small fixed annual sum, and in addition thereto in most cases a commission on amounts realised by sale of produce. It was stated in evidence before us that arrangements on these lines are made by nearly all rubber companies. The said produce is not sold by the firm, but by brokers in the usual course of trade on the instructions of the firm acting upon orders from the boards of directors."

Those being the facts with regard to the question of agency and with regard to the first of these two sums, namely, 1539*l*., I go back to the section. I do not intend to decide whether the appellants' business was an office or employment, or whether it was a profession the profits of which are dependent main'y upon the personal qualifications of the person by whom the profession is carried on, but I intend to decide the point which appears to me to be the only point involved in the case, namely, whether this was the business of a person taking commissions in respect of any transactions or services rendered, or the business of an agent not a commercial traveller, " and whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency " within the latter part of s. 39. Now it appears to me that the appellants' business was the business of a person taking commissions in respect of transactions or services rendered. The words of the section are of the widest possible character, and it is found in the case that the appellants were persons who were taking commissions in respect of services rendered. The m nutes of appointment which I have read say so. The appellants were in fact paid by commission, although the commission was not upon goods which they

themselves sold, because the goods were sold by brokers, but to my mind that does not make any difference; the words in the section are, as I have said, of a very sweeping character, and I think they cover this case. I also think the words "agent of any description" cover the case for this reason. If a person is an agent at all he is liable to excess profits duty unless he can satisfy the Court that either he is a commercial traveller—that does not apply to this case—or that he is an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency. Here in my view the appellants are agents. They are so described in their own document and in the minutes recording their appointment, and their remuneration consists of a sum depending on the amount of business done. It is dependent on the amount of business done through them, because they are the persons who instruct the brokers and carry on in the way I have described the business in this country. "Agent" is a word of the widest possible description.

I now turn to the second of the items for which they have been assessed to excess profits duty—namely, the sum of 4198*l*., which arises in this way. In 1914 a large Chinese company of the name of Hwik Hoo Tong was anxious to appoint someone to act for them in this country in a particular way, and the appellants accepted the invitation to act for that company. The nature of the work done by the defendants was as follows: They were to act as advisers of the Chinese company. The nature of the advice given—which was given by Mr. Burt—was with reference "to the position generally of the world's markets, supply and demand, prospects of crops, etc., and in order efficiently to perform this duty it was necessary for him constantly to keep himself well posted as to the fluctuations of the various markets, and to keep in touch with the leading men in the sugar trade in London, America, and, before the war, Germany." The remuneration was to be 100*l*. per annum, and he was paid "a commission of 1½ per cent. on all produce sold by the company whether in or out of the United Kingdom." Was that the business of a person taking

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commissions in respect of any transactions or services rendered, or the business of an agent who was not a commercial traveller and whose remuneration did not consist wholly of a fixed and definite sum? A distinction was endeavoured to be drawn by the learned counsel who appeared for the appellants between what you might call professional advice and commercial agency. I think that this part of the case is very near the line, but I further think that there is a great difference and a difference which is meant to be noticed by the statute between what I might call professional advice and commercial advice. The nature of the advice to be given in the present case appears to me to fall rather within the latter category—namely, commercial advice. It had reference to the position generally of the world's markets, supply and demand, prospects of crops, and in order sufficiently to perform this duty it was necessary for Mr. Burt constantly to keep himself well posted as to the fluctuations of the various markets, and to keep in touch with the leading men in the sugar trade in London and America. I very much doubt whether that comes within the meaning of the word "profession" the profits of which are dependent mainly upon the personal qualifications of the person by whom the profession is carried on. I do not propose to decide that in this case. All I ask myself is: Does it come within the latter words of the section; is it the business of a person taking commissions in respect of services rendered? I think it is. Mr. Burt's business was to mix with business men to ascertain the position of sugar (because the Chinese company was a company dealing chiefly in sugar) in the world's markets, and the question of supply and demand. It appears to me that it was a business as distinct from a profession in which the person who carried it on was remunerated by commissions in respect of the transactions or services which he rendered. I think therefore that just as the first item comes within those words so does the second, and I further think that it comes within the words "an agent of any description." With regard to the exceptions in s. 39 I do not propose to decide anything in regard to them. My decision is upon the narrow point, which I think is to a very large extent a question of fact, that

the appellants carried on the business of persons who were taking commissions in respect of transactions or services rendered. I think therefore that the appeal fails.

Appeal dismissed.

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Burt & Co. appealed. The appeal was heard on March 20, 21, 1919.

Sylvain Mayer K.C. and *S. Moses* for the appellants. This case was decided by Sankey J. on the ground that the appellants are agents receiving commission in respect of transactions or services rendered. The submission is that as to the secretarial work done for the various companies for whom they act the appellants are within exception (*b*) of s. 39, and as to the receipt of commissions they are within exception (*c*). The business of giving expert advice to the Chinese company is a profession mainly dependent on the personal qualifications of Burt & Co., by whom the profession is carried on within exception (*c*). The appellants are not taken out of the exceptions by the mere method of payment by commission on the sales of produce. The word commission in the section refers to commission on something done by the person taking the commission, as in the case of the brokers by whom the produce is sold. The profits earned by the firm consist partly of a fixed sum and partly of a share of profits. There cannot be a severance here as in *Inland Revenue Commissioners* v. *Maxse*. (1)

The appellants are not "agents" within the section: *Reg.* v. *Walker* (2); *Reg.* v. *Negus*. (3)

Sir E. Pollock S.-G. and *T. H. Parr* for the Commissioners were not called upon.

SWINFEN EADY M.R. I am of opinion that all that could be said in favour of the appeal has been urged, but in the view that I take the case is free from difficulty. The appellants

(1) [1919] 1 K. B. 647.
(2) (1858) 27 L. J. (M. C.) 207.
(3) (1873) L. R. 2 C. C. 34.

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appeal from an order of Sankey J., whereby he affirmed the decision of the Special Income Tax Commissioners refusing to exclude two items in an account for the purpose of dealing with the question of excess profits duty. The appellants claim that these two items ought not to be brought into account in arriving at the amount upon which duty is payable.

The appellants are co-partners trading together in partnership under a deed dated September 21, 1909. Both these gentlemen have had considerable experience in the East, especially in Java, and by the deed of September 21, 1909, they agreed to become and remain co-partners in the trade or business of general merchants and commission agents. That is their business as defined by their partnership deed. It is not in dispute that in respect of their general business they are liable to be assessed in respect of excess profits duty, but the only dispute between the parties is whether the two sums that we have to deal with should be brought into account in arriving at the amount of the profits upon which duty is payable. One is a sum of 1539*l.*, and the other is a sum of 4198*l.*, and the appellants contend that each of these two sums should be excluded.

The first amount is a payment to Burt & Co. for services which they render under agreements to act as secretaries or secretaries and agents of particular companies, usually rubber or rubber and tea companies. In order to save the companies the expense of a London office the companies contract with the appellants to provide an office and do the secretarial work, and act as secretaries and agents for the companies.

The resolutions appointing the appellants appear as an appendix to the case. In the case of the Baru (Java) Estates, Ld., the resolution is: "That the appointments of the following were confirmed . . . . secretaries and agents:—Burt & Co. (they are the appellants), 41, Eastcheap, E.C., at a fee of 150*l.* per annum and the usual commission on the sale of produce." It will be observed that Burt & Co. are paid and they are retained to act as secretaries and agents, in the language of their appointment, and their remuneration is to be a fixed sum of 150*l.* per annum and the usual commission

on the sale of produce. True it is that they say they themselves are not produce brokers and that the produce is actually sold by a broker upon their instructions, and that they instructing the broker are in turn instructed by the directors of the company. But the remuneration of the appellants is in terms a fixed sum and a commission on the sale of produce.

The next company is the Kalidjerock Rubber Co., and in that case Burt & Co. are secretaries ; they receive a remuneration of 150*l.* per annum, " with usual commission of $1\frac{1}{2}$ per cent. on the sale of produce." The only difference between this and the other case is that in their appointment they are not referred to as agents, only as secretaries, but apparently their duties are the same in each case and they are to be remunerated as well by a fixed sum as by a commission, there described as the " usual commission."

The next case is the Tjidadap (Java) Plantation Co., Ld. There they are appointed secretaries and agents. There is a resolution " That the secretaries and agents are authorised to charge " in addition to a salary of 100*l.* per annum to include the use of offices, " the usual commission on all sales of tea, at present $1\frac{1}{2}$ per cent., and the payment of the same for 1910 was confirmed."

Again there is a like appointment for the Pandan Aroem Syndicate, Ld., at the fixed " remuneration of 100*l.* per annum with the usual commission " and a similar appointment to another company, the Java Rubber and Produce Co., Ld.

It will be observed that in all those appointments the secretaries are to receive as well a fixed amount as a payment by way of commission To act as secretaries to companies is part of their regular business, they carry that on, and the question is whether they come within the language of the last clause of s. 39 of the Finance (No. 2) Act, 1915. That is really a question of fact, and the commissioners have determined it as a matter of fact. They say : " Having taken time to consider the matter we were of opinion that even if the appellants are within either or both of the exceptions (*b*) and (*c*) in s. 39 they are brought back into charge by the

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concluding words of the section as being persons taking commission or agents whose remuneration does not consist 'wholly of a fixed and definite sum not depending on the amount of business done or any other contingency.'" Sankey J. arrived at the same conclusion.

It will be observed that the language of s. 39 is very comprehensive. It begins by including "all trades or businesses of any description"—the appellants are obviously within that—"except"—and then the question is whether they are within the exceptions. The exceptions are lettered (*a*), (*b*), (*c*). Then the section goes on—"but including" (and I read that as meaning that if a person would otherwise be within (*a*), (*b*) or (*c*) if he falls within the description of what follows he is excepted from the exception, and therefore within the charging clause, "but including the business of any person taking commissions in respect of any transactions or services rendered."

Now the appellants do receive commissions, and the services that they render are the services that they are retained to render, acting as secretaries or as secretaries and agents and obeying the instructions of the firm. The ground upon which it is said they are not within that is because apparently somebody else renders services also, and he is also paid by commission. The actual sales of property, tea or rubber as the case may be, are made through brokers. But seeing that the business of the appellants includes the business of taking commissions in respect of services which they render it does not matter that other persons also receive commission in respect of such services as they may render as brokers for the sale of the produce. We have only to do with the appellants, and they certainly come within the latter description, "agents of any description (not being commercial travellers or agents whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done or any other contingency)." They are agents, and their remuneration does depend upon the amount of business done; they are paid by a commission on the business done. It does not necessarily follow that the business is done through

them, but their remuneration is dependent upon the amount of business done and their commission is calculated on that only. In respect of the sum of 1539*l.*, which is the payment to them for services that they render under these engagements as secretaries or secretaries and agents to these respective companies, I am of opinion that they make out no case to be excepted from the charging clause.

The other sum of 4198*l.* is a payment which they receive in respect of services rendered to a Chinese company, Hwik Hoo Tong, which has business transactions of considerable magnitude, and the payments which the appellants receive from the company consist in part of a small fixed sum and in part of a commission on the sales of the Chinese company, not sales through the appellants—it is not limited to that—but on produce which the Chinese company sell, and in addition the appellants receive a small fixed sum of 100*l.* a year. In order to earn that remuneration Burt & Reid have to perform services to the Chinese company, and the nature of the services is this. They act as correspondents and advisers of the Chinese company here; they keep the Chinese company informed in regard to the course of the markets, the demand and supply of commodities, the prospects of crops and so on in order that the Chinese company may be kept fully informed of the progress of the commercial fluctuations and prospects, especially in the commodities in which the Chinese company deal. They deal mostly in sugar. I do not understand that their transactions are entirely limited to sugar, but they are mainly in sugar, and in respect of those matters it is the duty of the appellants to advise Hwik Hoo Tong with reference to the position generally of the world's market supply and demand, the prospects of crops and so on; and in order that they may be put in a position usefully to perform those duties it is necessary for them to keep themselves constantly informed of the course of the markets, of their fluctuations, and to keep in touch with the leading persons here and abroad in the various trades dealing with those articles of commerce. That being so do they come within the description of persons taking commission in respect

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of services rendered? Do they carry on that business? I am satisfied that they do. They are, especially Mr. Burt, highly qualified to perform and render valuable services in that direction. It is a substantial part of the business that they carry on, and they are remunerated by commission, true, not by commission on produce they themselves sell, but they are remunerated by a commission for the services that they render. Under these circumstances, having regard to the facts as found by the commissioners, I am of opinion that on both points Sankey J. was right, and that the judgment ought to be affirmed, and for the reasons which he gave.

WARRINGTON L.J. I agree. I have nothing to add to the judgment of Sankey J. or to that of the Master of the Rolls.

SCRUTTON L.J. Messrs. Burt & Co. appear to carry on a business which is not uncommon nowadays. As part of the work they are ready to perform, they are willing to act as companies' secretaries and agents: they are not merely the secretary of one company but they are ready to house and provide secretarial work and carry out the business of any number of companies which come under their hospitable roof. It is not an uncommon profession or business at the present time in the City of London.

The question is whether they ought to be assessed on the income which they derive from that business. I do not go through the facts which have been stated by the Master of the Rolls but I address myself to the construction of the statute. The excess profits duty is to be charged on "the profits arising from any trade or business to which this part of this Act applies." To find out to what trade or business this part of this Act applies you must go to s. 39. "The trades and businesses" to which this part of this Act applies are all "trades or businesses of any description carried on in the United Kingdom." The words "trades or businesses" are not used in the Income Tax Acts. When one looks at Sched. D, to which one generally looks for the wording applicable to the profits of trade—the words are "trade

profession employment or vocation"—I conjecture therefore that the word "businesses" is used, particularly having regard to the exceptions which follow, as prima facie including professions, employments or vocations.

Having said that the Act states some exceptions from "all trades or businesses." Husbandry in the United Kingdom is excepted, offices or employments are excepted. Now "offices" brings in a new word, because when one mentions "offices" in connection with income tax one generally looks at Sched. E, which is limited to public offices, and it seems to me that when the Act speaks of offices or employments—employments there is no doubt about, they are already in Sched. D, and I think are included in the word "businesses"—"offices" must apparently be some subordinate appointment in a business, the holder of which would perhaps be hurt if he were called an employee or servant, but which may perhaps be described as offices. "Any profession" is again, I think, covered by the word "businesses," "any profession" having certain characteristics. Then having got so far and having excluded from "all trades and businesses" three several matters, Parliament seems to have thought "we do not mean to exclude certain things, and it may be that what we have done has taken out certain things which we mean to include," and they add "but including the business of any person taking commissions in respect of any transactions or services rendered."

Now if that meant, as Mr. Mayer suggests, the business of a man who has nobody over him either because he holds an office or is an employee of the original business, there would be no need to put it in because all trades and businesses are already in. In my view that must have been put in to take out of "offices and employments" such offices and employments as are remunerated by commission "in respect of any transactions"—that is one thing—or "in respect of any services rendered." "Rendered" applies to the services and not to the transactions; you do not render a transaction.

Now, are Messrs. Burt, from that point of view, holding an office or employment, which I read as a business, taking

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commissions in respect of any transactions or services rendered? Where they themselves do something in connection with the sale they are getting commissions. Where they do not do anything in connection with the sale to get commission on it, it is a transaction, and they appear to me to come entirely within the words "business of any person taking commissions in respect of any transactions or services rendered." It is not necessary for us to find as a fact that they do. It is enough to say that there is evidence upon which the Commissioners could so find.

Then the section goes on, "and of any agent of any description," which I think would originally have come within "offices or employments," and then apparently—one can only conjecture—it was suggested in the House, "What about commercial travellers?" And they put in "not being a commercial traveller," a paragraph which they might very well have put in under the earlier section, "business of any person taking commissions." "Or an agent whose remuneration consists wholly of a fixed and definite sum not depending on the amount of business done." Now the Commissioners have found that these gentlemen are agents. They describe themselves as agents in their partnership deed. They are described as agents in the resolutions appointing them in the case of at least one of the companies, and the Commissioners have found that they are agents. They are not commercial travellers, and their remuneration does not consist wholly of a fixed and definite sum. It seems to me therefore that under that head also there is evidence on which the Commissioners might if they liked find that they were agents within the last part of the section. So much for the question of the 1539*l.*

The 4198*l.* is remuneration by way of commission which has come to these gentlemen as what I may call market advisers. In all trades the head of the business or somebody in the business must know something about the markets, but in the case of a business carrying on a very extensive trade it may be desirable to pay somebody else to know all about markets, and from the Chinese firm, Hwik Hoo Tong, Messrs. Burt got some 4000*l.* in the particular year of assessment.

Now I am not clear whether it is said that that was an office or employment or a profession or both. If it be treated as an office or employment the same remark that I have made about the 1539*l.* applies to it, that it is the business of a person taking commissions in respect of transactions. If it be treated as a profession, whatever may be the limitation of a profession, I do not think it applies to the exercise of commercial knowledge in connection with the sale of goods, or export or import of goods. For these reasons I am of opinion that the Commissioners would be quite right in saying that this business of market advisers is not a profession which would come within (*c*). If it were it would be taken out again under the latter part of the section. For these reasons, depending on the construction of the statute, I agree with the view taken by the other members of this Court, the judge below, and the Commissioners.

Appeal dismissed.

Solicitors for appellants : *Geo. & Wm. Webb.*
Solicitor for respondents : *Solicitor of Inland Revenue.*

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July 11, 15, 16, 17, 31.

[IN THE COURT OF APPEAL.]

BRITAIN STEAMSHIP COMPANY, LIMITED *v.* THE KING.

[1918. B. 2296.]

BRITISH INDIA STEAM NAVIGATION COMPANY *v.* GREEN & Others and LIVERPOOL & LONDON WAR RISKS INSURANCE, LIMITED.

[1918. B. 1791.]

Shipping—Steamship requisitioned by Admiralty—Charterparty—Navigating without Lights in compliance with Admiralty Regulations—Collision—Loss of Ship—"Consequence of hostilities or warlike operations"—"Cause arising as a sea risk"—Liability of Admiralty.

The expression "warlike operations" in a policy of marine insurance suggests some act done by one of two parties at war with each other against one of them or by one of such parties with the object of meeting or avoiding an actual or threatened attack by the other. There is a clear distinction between an operation of such a kind and one of a peaceful character conducted under conditions rendered necessary or desirable by the existence of a state of war.

The steamship *Petersham* was requisitioned by the Admiralty on the terms of a charterparty which provided that "the Admiralty shall not be held liable if the steamer shall be lost . . . . in consequence of dangers of the sea . . . . collision . . . . or any other cause arising as a sea risk," but the Admiralty took the risk of "all consequences of hostilities or warlike operations." On May 6, 1918, the *Petersham*, while on a voyage with a cargo of iron ore, was being navigated at night without lights in compliance with Admiralty regulations when she came into collision with another steamship also carrying a cargo and also being navigated without lights under the same regulations, the *Petersham* being sunk. It was admitted that there was no negligence on the part of either ship, and that the collision could not have been avoided by the exercise of reasonable care and skill, being due proximately to the fact that neither vessel was showing her lights. The regulations requiring ships to be navigated without lights were issued by the Admiralty with a view to safeguard British and other merchant ships from possible enemy action, but there was no evidence that any enemy submarines were present at the time of the collision:—

Held, that the compliance by a vessel, not otherwise engaged in a warlike operation, with an Admiralty regulation that vessels should navigate at night without lights in order to avoid possible attacks by submarines, was not in itself a warlike operation, and that therefore the loss of the *Petersham* was not a consequence of warlike operations,

but was a "consequence of collision or any other cause arising as a sea risk," and that therefore the Admiralty were not liable for the loss.

British and Foreign Steamship Co. v. *The King* [1918] 2 K. B. 879 distinguished.

Decision of Bailhache J. [1919] 1 K. B. 575 affirmed.

Insurance (Marine)—War Risk—"Warlike Operations"—Sailing under Convoy—Loss by Stranding.

By a time policy a steamship was insured against war risks. The material clause in the policy insured the vessel against "all consequences of hostilities or warlike operations by, or against, the King's enemies." By another time policy the steamship was insured against the usual marine perils, including perils of the seas. The policy contained an f.c. and s. clause, the material words of which were "warranted free from . . . . all consequences of hostilities or warlike operations. . . . ." During the time covered by the policies the steamship, one of four merchant steamships carrying cargoes of cotton, while proceeding under convoy ran upon a reef of rocks and became a total wreck. The vessels were zigzagging, the night was dark, they were upon an unaccustomed course, and the currents were variable and of unknown direction and force. The master was under the orders of a King's officer and was not responsible for the course taken. His business was to keep his position relatively to the other three ships. There was no negligence proved either on the part of the master or the King's officer:—

Held, that there were no "warlike operations" of which it could be said that the loss of the ship was the consequence, and that the loss fell upon the marine risk underwriters.

Decision of Bailhache J. [1919] 1 K. B. 632 reversed.

THESE were two appeals from decisions of Bailhache J. (reported [1919] 1 K. B. 575; [1919] 1 K. B. 632), which raised the same question, namely, whether the loss of a ship was the consequence of "warlike operations" within, in the first case, an Admiralty charterparty in Form T. 99, and, in the second case, a policy of marine insurance.

In the first case, the *Petersham* was sunk by collision whilst sailing under Admiralty orders without navigation lights; in the second case, the *Matiana*, whilst sailing in a convoy, under Admiralty orders, was lost through stranding on a reef.

The facts of the two cases are fully stated in the reports in the Court below, and they also appear from the judgments of the Court of Appeal.

In the first case, Bailhache J. held that the *Petersham* was not engaged in a warlike operation and entered judgment for the Crown. In the second case he held that the loss of the

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Matiana was due to warlike operations as the proximate and direct cause, and he entered judgment against the war risks underwriters. In the first case the owners of the *Petersham*, and in the second case the war risks underwriters appealed. There was also a cross appeal in the second case entered by way of precaution by the marine underwriters in the event of the Court's allowing the appeal of the war risks underwriters.

The appeals were heard consecutively, and the Court delivered their considered judgments in the two cases upon the same day.

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MacKinnon K.C., *R. A. Wright K.C.* and *C. R. Dunlop* for the appellants (the shipowners). The *Petersham* was lost by a peril excluded from the ordinary marine policy by the clause "Free from all consequences of hostilities or warlike operations," and it therefore falls to the Crown to bear the loss. It is admitted that the collision was due solely to the fact that under Admiralty orders the colliding ships were being navigated without lights. If the lights had been exhibited the ships could have seen and avoided one another. It is not a case where there was any negligence or mistake. Two questions only have to be considered.

1. Does the fact that both ships, by the orders of the Admiralty, and in order to avoid enemy attack, were being navigated without lights constitute a "warlike operation"?

2. If that be answered in the affirmative, was the sinking of the ship a consequence of the warlike operation within the meaning of the clause?

Upon the first point the case most directly in point is *British and Foreign Steamship Co.* v. *The King*. (1) It was there held that the loss of the *St. Oswald*, a ship requisitioned by the Admiralty, which came into collision with a French battleship, both of which had their navigation lights screened in accordance with Admiralty regulations, was a "consequence of warlike operations" within the meaning of the charterparty and that the Admiralty were liable. The mere fact that one

(1) [1917] 2 K. B. 769; [1918] 2 K. B. 879.

of the ships in that case happened to be a battleship does not distinguish that case from the present. Nor does the fact that the *St. Oswald* was about to take troops on board make any difference. It had no causal relation to the collision. Rowlatt J. had there to consider the consequences rather than the cause of the collision. The judgment of Swinfen Eady M.R. did not proceed upon the admission of counsel for the Crown that sailing without lights was a "warlike operation," or on the fact that one ship was a warship and the other was being used for transporting troops. In his view the steaming without lights was a warlike operation.

[DUKE L.J. In that case I regarded the question of warlike operations as concluded by the admission of the Attorney-General.]

If in the present case the *Petersham* had been carrying troops it would have made no difference: the collision would still have been due to steaming without lights.

[DUKE L.J. Was the *Petersham* at the time engaged in war?]

The clause in the charterparty shows that the parties were not contemplating warlike operations in the sense in which those words are used in international law. The *Petersham* and all merchant vessels at that time carried guns. Suppose the ammunition on board one of these ships exploded, could it be said that the explosion was not due to a warlike operation? *British and Foreign Steamship Co.* v. *The King* (1) was followed by Roche J. in *Inui Gomei Kaisha* v. *Attolico* (2), who there expressed the view that steaming without lights was a warlike operation. That case went to the Court of Appeal, but the point did not there arise for decision.

The decision in the present case must involve a definition of the term "warlike operations." It is submitted that the term is wider than the term "hostilities." The only case in which the question has been discussed is *Robinson Gold Mining Co.* v. *Alliance Insurance Co.* (3) The observations of Collins M.R. there show that there may be warlike operations where the

(1) [1918] 2 K. B. 879. (2) Lloyds List, July 20, 1918.
(3) [1902] 2 K. B. 489, 500.

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act is done in a time of war and for the purposes of the war. The meaning of the term is something different from hostilities. It includes acts done for offence or defence in the conduct of a war. The case went to the House of Lords (1), but the point was not there considered

The *Petersham* was carrying goods and was therefore engaged in a commercial venture, but was so engaged in a time of war and at a time when it was the declared policy of the enemy to destroy the mercantile fleet. The adventure was therefore taken out of the category of an ordinary mercantile venture. Merchant vessels were then the deliberate objects of hostile attack and as a military measure sailing without lights, which was contrary to the rules of navigation, was ordered as a defensive protection against submarine attacks. Under such circumstances a ship so sailing was engaged in warlike operations and an accident happening to it in consequence would be taken out of an ordinary marine risk : *Henry & MacGregor, Ld.* v. *Marten* (2) ; *Ard Coasters, Ld.* v. *The King.* (3)

They also referred to *Ionides* v. *Universal Marine Insurance Co.* (4) ; *Becker, Gray & Co.* v. *London Assurance Corporation.* (5)

W. N. Raeburn K.C. (*Sir Gordon Hewart A.-G.* with him) for the Crown. The conclusion at which the learned judge in the Court below arrived was right, although all the illustrations given in his judgment are not admitted. The broad question is whether steaming without lights is in all cases a warlike operation. That question was excluded from the decision in the *St. Oswald Case* (6) by reason of the admission of the then Attorney-General that steaming without lights was a warlike operation. (7) The definition suggested by the appellants' counsel of warlike operations is unnecessarily wide and leads to absurd results. It is suggested that a " warlike operation " is some operation of a bellicose nature offensive or defensive—an operation of war and not of commerce. Under the regula-

(1) [1904] A. C. 359.
(2) (1918) 34 Times L. R. 504.
(3) (1919) 35 Times L. R. 604.
(4) (1863) 14 C. B. (N. S.) 259.
(5) [1918] A. C. 101.
(6) [1918] 2 K. B. 879.
(7) [1917] 2 K. B. 769, 771.

tion 37 of the Defence of the Realm Regulations a breach of the regulation as to steaming without lights by a master is an offence. No doubt the vessels were steaming without lights by reason of the existence of warlike operations, but the steaming without lights was not in itself a warlike operation. Was it a warlike operation to leave London and go to Brighton to escape air raids? Suppose a person were knocked down by an omnibus in a darkened street, would that be due to warlike operations? In each of the instances given by Erle C.J. in *Ionides* v. *Universal Marine Insurance Co.* (1) he presupposes the existence of a state of hostilities. *Butler* v. *Wildman* (2) illustrates the situation that arises where there are direct hostilities. There dollars were thrown overboard on account of the immediate prospect of an attack, and it was held that the underwriters were liable. Sailing without lights is a measure adopted to avoid a peril of war. A loss incurred in an attempt to avoid a peril is not necessarily a loss by that peril: *Becker, Gray & Co.* v. *London Assurance Corporation.* (3) In *Coxe* v. *Employers' Liability Assurance Corporation* (4), where in consequence of the lights of a railway line being obscured owing to war, a man was killed whilst pursuing his military duty of inspecting sentries posted at various points along the line, and it was held that his death was indirectly caused by war. It is clear that if the word "indirectly" had not been in the policy in that case the judge would have held that the maxim causa proxima non remota spectatur applied. Here the Admiralty were increasing the marine risks for the purpose of decreasing the war risks. The absence of lights did not cause the accident. It amounted to a mere absence of extrinsic saving power. The distinction sought to be drawn between putting out the lights of a lighthouse as in the *Ionides Case* (5) and putting out the lights in this case is a distinction without a difference.

[WARRINGTON L.J. referred to Reg. 37 of the Defence of the Realm Regulations.]

(1) 14 C. B. (N. S.) 259, 286.
(2) (1820) 3 B. & Al. 398.
(3) [1918] A. C. 101, 110, 111.
(4) [1916] 2 K. B. 629.
(5) 14 C. B. (N. S.) 259.

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It is important to look most strictly at the proximate cause. *Henry & MacGregor, Ld.*, v. *Marten* (1) is an illustration of a bellicose action. The master there was doing something actively bellicose. *Ard Coasters, Ld.*, v. *The King* (2) is a similar case. There Bailhache J. based his judgment on the fact that the ship to which the accident happened was on patrol duty by night without lights on the look out for submarines which had been very active in the neighbourhood and was undoubtedly engaged in a warlike operation.

[WARRINGTON L.J. We had better not give judgment until we have heard the next case.]

Cur. adv. vult.

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Aspinall K.C. and *Raeburn K.C.* for the War Risks Association. It is submitted (1.) that the *Matiana* at the time of the accident was not engaged in any warlike operation, and (2.) that if she was so engaged the cause of the casualty and loss was not the result of such operation.

The question of torpedoing dealt with in the Court below may now be disregarded.

Upon the question whether the ship was engaged in a warlike operation little can be added to what was said in *Britain Steamship Co.* v. *The King*, where all the cases were fully dealt with. The precautions required by the Admiralty to be taken such as sailing in a convoy, not sounding the whistle, and not carrying lights, were not warlike operations. The mere fact that the master of a ship obeys an order emanating from a War Department does not make his actions warlike operations. If in consequence of obeying such orders the ship strikes wreckage, that would not be a war, but a maritime risk, and any loss thereby occasioned would fall on the marine insurers. The mere presence of a warship with the convoy did not convert what was otherwise a peaceful operation into a warlike operation. A peaceful operation conditioned by a state of war is not a warlike operation. Bailhache J.

(1) 34 Times L. R. 504. (2) 35 Times L. R. 604.

has decided that sailing under convoy is a warlike operation, but it cannot be that because a ship is complying with an Admiralty order and suffers a marine disaster, the assured can recover as for a war risk. The mere fact of being associated with a warlike operation is not enough. The military operation must be the direct or dominant cause of the loss. See the judgment of Scrutton L.J. in *British and Foreign Steamship Co.* v. *The King.* (1) To test the connection between the stranding and the military operation in this case, what caused the stranding? Obedience to the order of the naval officer. What caused the order of the naval officer to be given? Here we can only speculate. If the evidence showed that the order was given in consequence of the presence of an enemy submarine, it might be that the stranding was connected with the order; but no direct connection between the stranding and any warlike operation has been proved. It is not enough to say that in the course of sailing in convoy the vessel stranded.

The next question is whether, assuming there was a warlike operation in progress, the stranding of the ship was proximately and directly caused by it. It is submitted that it was not. According to the well-established rule of marine insurance law it is the proximate cause of the disaster which must be sought for. That is well illustrated by *William France, Fenwick & Co.* v. *North of England Protecting and Indemnity Association.* (2) Here we are left in doubt how it was that the ship found herself in the fatal position. Prima facie the loss was due to a marine peril, and it is for the marine underwriters to set up the "free from hostilities or warlike operations" clause and to bring themselves within it if they can: *Munro, Brice & Co.* v. *War Risks Association.* (3) Here the immediate or direct cause of the ship striking the reef is not shown.

[ATKIN L.J. referred to *Leyland Shipping Co.* v. *Norwich Union Fire Insurance Society.* (4)]

There the ship was all along in the grip of the warlike operation. That case does not really affect the present one.

(1) [1918] 2 K. B. 879, 886.
(2) [1917] 2 K. B. 522.
(3) [1918] 2 K. B. 78.
(4) [1918] A. C. 350.

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This Court cannot say, upon the evidence, what was the proximate cause of the loss; it can only guess.

R. A. Wright K.C. and *Claughton Scott* for the respondents, the marine underwriters. The stranding was clearly the consequence of a warlike operation. It is contended that this was merely a commercial adventure, but that is not so. The whole system of submarine attack and the attempted evasion of it was a warlike operation. While sailing under armed convoy the ships were endeavouring to break the submarine blockade.

[ATKIN L.J. They were not converted into warships.]

The operation in which they were engaged was getting the convoy past the dangerous region. The units of the convoy cannot be separated. The whole proceeding was a warlike operation. The loss was the direct result of it. In obeying the order of the naval officer in command of the escort the ship was wrecked. There was no intervening cause of the loss. There was no negligence, except (if any) that of the naval officer. The expression "warlike operations" is an amplification of the word "hostilities" and goes beyond it. It cannot be limited, as is contended, to hostile action whether by attack or defence, nor can it be limited to the operations of a warship. A ship engaged in a commercial adventure but carrying guns and ammunition for defence is engaged in a warlike operation. Sailing in convoy is a warlike operation. There is no distinction, for that purpose, between the escort and the convoy. The convoy in this case was engaged in getting through a region occupied by a hostile belligerent. There was every element of a warlike operation, the guidance and control of the naval forces, and the endeavour to evade or repel a threatened enemy attack.

Mackinnon K.C. and *Lewis Noad* for the plaintiffs.

Raeburn K.C. in reply.

Cur. adv. vult.

July 31. WARRINGTON L.J. read the following judgment. These are two appeals which, on different states of facts, raise the same question—namely, whether the loss of a ship, in the

one case by collision, in the other by running on a rock, is to be treated as the result of a marine risk or as the consequence of hostilities or warlike operations. The question in the one case arises between the shipowners and the Crown under a charterparty, in the form known as T. 99; in the other between the war risks underwriters and the marine risks underwriters. Bailhache J. has decided the first case in favour of the Crown, and the second in favour of the marine risks underwriters.

In the first case, the *Britain Steamship Co.* v. *The King*, the question is raised by a petition of right praying His Majesty to cause the petitioners to be reimbursed in respect of their claim for the loss of their steamship *Petersham*. On May 6, 1918, the *Petersham* was on a voyage from Bilbao to Glasgow with a cargo of iron ore. The night was very dark. The *Petersham* at about 11.20 p.m. came into collision with the steamship *Serra* belonging to the port of Bilbao, and at the time on a voyage from Swansea to Barcelona, via Bilbao. The collision took place in the neighbourhood of and about twelve miles from Trevose Head on the west coast of Cornwall. As the result of the collision the *Petersham* sank. Both ships were sailing without lights in accordance with Admiralty regulations and instructions given with a view to safeguarding British and other mercantile tonnage from enemy action and the consequences thereof. The collision could not, owing to the absence of lights, have been avoided by the exercise of reasonable care and skill on the part of those on board the two ships respectively, and in fact in an action between the present suppliants and the owners of the *Serra* it was held that no negligence had been proved and such finding is accepted by the Admiralty as correct. The *Petersham* was, at the date of the collision, in charter to the Admiralty under a time charter in the form known as T. 99. It contains two material clauses, 18 and 19, which are as follows :—" 18. The Admiralty shall not be held liable if the steamer shall be lost, wrecked, driven on shore, injured or rendered unfit for service by or in consequence of dangers of the sea, or tempest, collision, fire, accident, stress of weather, or any other cause arising as a sea risk.

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19. The risks of war which are taken by the Admiralty are those risks which would be excluded from an ordinary English policy of marine insurance by the following or similar but not more extensive clause :—Warranted free of capture, seizure, and detention and the consequences thereof or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war."

I will now state the facts in the second case, that of the *British India Steam Navigation Co.* v. *Green.* There are two appeals—first, the appeal of the war risks underwriters from the judgment of Bailhache J. against them, and, secondly, that of the plaintiffs against his judgment in favour of the marine risks underwriters. The real combatants are the two sets of underwriters.

The steamship lost was the *Matiana.* She was homeward bound on a voyage from Egypt with cotton. The accident causing her loss happened on the night of May 1, 1918. The *Matiana* and three other merchant ships were sailing in convoy under the escort of four of His Majesty's ships. Under s. 31 of the Naval Discipline Act, 1866 (29 & 30 Vict. c. 109), the master was bound to obey the orders of the officer commanding the escort, i.e., the senior naval officer present, in all matters regarding the navigation of his ship and the security of the convoy, and under s. 46 of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), was subject to a heavy penalty should he fail to do so.

The convoy had to traverse a part of the Mediterranean, between Sardinia and the Gulf of Tunis, which was infested by enemy submarines. With the object of avoiding an attack the convoy steered a course more northerly than that usually adopted in time of peace. At 9.3 p.m. under order of the senior naval officer the course was changed from N. 30 W. to N. 51 W. The ships had been warned earlier in the evening that this change of course would be made. At about 12.15 a.m. the *Matiana* struck a small reef called the Keith Reef, which is unlighted. Some hours later she was torpedoed, but it is admitted that the ship was lost as a consequence of the strand-

ing. The master believed that his position at 9.3 p.m. was such that a course N. 51 W. would have taken him some nine miles to the southward of the Keith Reef. The naval officer was not called and nothing therefore is known as to his information at the time he gave the order to turn. The currents in that neighbourhood are very uncertain. The convoy was sailing a zigzag course from 10 p.m. until the accident, but the master says notwithstanding that fact he was keeping the correct mean course of N. 51 W. Either the ship must have been further to the northward at the time of the turn than was supposed or she must have drifted north during the $3\frac{1}{4}$ hours between 9.3 p.m. and 12.15 a.m., but there was no evidence proving how it came about that she struck the reef instead of passing to the southward of it. There was no evidence that the naval officer's order to change the course was given in consequence of information that a submarine was in the neighbourhood, in fact the contrary would appear to be the case, for the change had been arranged some hours before, the moment of the change only being left to be decided.

The facts resolve themselves into this—that the ship was lost by stranding when sailing with convoy on a course prescribed by the commander of the convoy, not for the purpose of avoiding or resisting attack by a particular enemy, whose presence was known, but as part of a series of precautionary measures taken for the safety of these merchant ships in waters in which enemy craft might not improbably be encountered.

The *Matiana* was insured by two policies—first, an ordinary marine policy containing a clause "warranted free from capture, seizure, arrest, restraint or detainment or the consequences thereof, or any attempt thereat, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war"; and, secondly, a war risks policy expressed to cover, amongst other things, "all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war."

Bailhache J. has held in this case that to sail with convoy is a warlike operation in itself, and he has also held that the

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stranding was directly due to it and was therefore the consequence of a warlike operation within the meaning of the policy.

It is admitted in both cases that collision in the one case and stranding in the other is prima facie a marine risk for which neither the Admiralty in the one case nor the war risks underwriters in the other would be liable. To make them liable it is necessary to establish that the loss was the consequence of hostilities or warlike operations. This involves two propositions :—(1) that according to the true construction of the charterparty in the one case, and the policies in the other, there were hostilities or warlike operations of which the loss could be the consequence ; and (2) that the loss was in fact the consequence thereof, bearing in mind the well-known principle of insurance law that to render insurers liable the peril must be the proximate and not a remote cause of the loss.

If the first proposition is not established the second cannot be, and I will, therefore, deal first with the question of construction.

It is admitted by the suppliants in the first case that the expression warlike operations is that on which the question turns, as being wider than hostilities, and I propose to consider the meaning of that expression alone. There has so far been no decision in this Court covering either of the cases before us, for in the *British and Foreign Steamship Co.* v. *The King* (1), where a collision occurred while ships were sailing without lights, it was not disputed that under the circumstances of that case the sailing without lights was a warlike operation. The *St. Oswald*, the ship whose loss gave rise to the question, was engaged in the transport of troops in the course of the evacuation of Gallipoli, and was bound for Helles to take troops on board, while the colliding ship was the French warship *Suffren*. In fact, Scrutton L.J. says that in his view of the law the judgment must not be taken as deciding either that every collision where the vessels are steaming without lights is a war risk or that steaming without lights by Admiralty orders is always a warlike operation. In the case of the *Petersham*

(1) [1918] 2 K. B. 879.

the only warlike operation alleged is the steaming without lights by Admiralty orders, and the question reserved by Scrutton L.J. therefore arises for decision.

As to sailing with convoy and its effect there has been no decision at all.

What then, in the absence of authority, is the meaning of the expression "warlike operations" in a clause originally devised to exclude the consequences thereof from the ambit of a policy of marine insurance, and afterwards used as a form to define the risks undertaken by those who contract to bear, or who insure against, the risks so excluded? To my mind the expression suggests some act done by one of two parties at war with each other against the other of them, or by one of such parties with the object of meeting or avoiding an actual or a threatened attack by the other. There seems to me to be a clear distinction between an operation of such a kind and one of a peaceful character conducted under conditions rendered necessary or desirable by the existence of a state of war.

Many operations were conducted during the war now ended under conditions different from those under which they would have been conducted in time of peace. Trains were run with closely drawn blinds; street traffic was conducted in darkened streets; and many other examples could be given. In my opinion it could not properly be said that in any such cases the operations themselves become warlike operations.

So with regard to the more important subject of maritime traffic and intercourse. For avoiding capture or destruction by enemy craft it becomes necessary or desirable that ships should sail under certain unusual conditions. One of these is the absence of navigation lights. The sailing without lights, provided the errand itself on which the ship is bound is a peaceful one, e.g., the carrying of an ordinary cargo from port to port, is a peaceful operation performed under conditions adopted by reason of the existence of a state of war and is not of itself a warlike operation.

So with regard to sailing with convoy. This is only another device adopted to avoid attack or provide means of defence

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or escape in case an attack should be made. The duty of those in charge of merchant ships sailing with convoy to obey the commands of the naval officer in command of the escort is the natural result of the sailing of several ships in company and of the purpose for which they do so, but again the sailing in company and the presence of the escort with the necessity of obedience to the orders of the commander thereof are in my opinion nothing but special conditions under which the peaceful operation of conducting maritime traffic has to be carried on by reason of the existence of a state of war. Of course the sailing with convoy may easily assume the character of a warlike operation; if the convoy were actually attacked or if an attack were impending or immediately apprehended then from that moment the operations might well become warlike operations. In the case of the *Matiana*, nothing of this sort happened. There was no evidence that the fatal change of course was ordered as the result of any information leading to the belief that the ships would be attacked; on the contrary, it was determined on long before it was made, and the course was apparently chosen and imposed on the convoy as a precautionary measure for avoiding possible attacks.

In my opinion, therefore, in both cases there were no warlike operations of which it could be said that the loss was the consequence.

In the view I take of the construction and effect of the expression "warlike operations" it becomes unnecessary to consider the further question whether assuming my view is wrong, the actual loss can in either case be said to be the consequence, namely, the direct consequence of the particular warlike operation. In the case of the *Petersham*, Bailhache J. expressed no opinion on this point as he took the same view of construction as I have expressed. In the case of the *Matiana*, however, he did express the opinion that the loss was the consequence of the warlike operation. He seems to have thought it enough to say that it was due to the fact that the ship was sailing under orders. With great deference, in the face of his experience, I have grave doubts whether this can be so. I think it is incumbent on those who seek to throw

the loss on the war risks underwriters to prove that the loss was the direct consequence of some warlike operation. Assuming that the order of the commander was a part of the operation I do not think it was proved in this case that the loss was directly caused by that or by the master's obedience to it. The plaintiffs in fact leave it in doubt whether the stranding was inevitable if the order was obeyed or whether there was some other cause such as the effect of currents which brought it about.

In the result I am of opinion that in the case of the *Petersham* the appeal must be dismissed, with costs. In the case of the *Matiana*, the first appeal must be allowed, and judgment entered for the defendants, the war risks underwriters, with costs here and below; and the plaintiffs' appeal against the marine underwriters must also be allowed and judgment entered against them, with costs here and below.

DUKE L.J. read the following judgment:

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On May 6, 1918, the steamship *Petersham* was on a voyage between Bilbao and Glasgow, and was being navigated without lights "under Admiralty regulations and instructions," when she came into collision with the steamship *Serra*, on a voyage between Swansea and Bilbao, navigated in like manner, and the *Petersham* sank. The material facts as to the collision are summed up in this statement of the suppliants in the petition of right: "The said collision could not, owing to the absence of the usual navigation lights, have been avoided by the exercise of reasonable care and skill by those on board the *Petersham* and *Serra*. The absence of these lights was in accordance with the directions and instructions issued by the Admiralty with a view to safeguarding British and other mercantile tonnage from possible enemy action and the consequences thereof." The *Petersham* was insured by the Admiralty against, inter alia, consequences of warlike operations. Bailhache J. has held that the loss was

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not a loss in consequence of warlike operations and the owners appeal from that decision. The matter at issue is whether the sailing of the *Petersham* without lights was a warlike operation. To cite from the judgment of the learned judge (1): "Does the mere fact that, in order to avoid the common danger of attack by submarines, a vessel upon a non-warlike errand in obedience to Admiralty regulations sails without lights constitute a warlike operation?"

That sailing without lights may be a warlike operation, or part of such an operation, is shown by the admission made on the part of the Crown, in *British and Foreign Steamship Co.* v. *The King* (2), which was much discussed during the arguments. The question, however, which was considered in this Court in that case (3) was not whether sailing without lights in time of war is a warlike operation, but whether the sailing of the *St. Oswald* without lights on the occasion then under consideration was the proximate cause of her loss. I have not been able to see that the judgments pronounced here upon that question can be of use in determining whether the sailing of the *Petersham* and the *Serra* without lights was a warlike operation. For this purpose it is necessary to consider what, within the meaning of the contract of insurance made by the Admiralty, is a warlike operation and what was the character of the operation in course of which the *Petersham* was sunk. Was it an operation of war or an operation of commerce?

The examination of the case which was made on behalf of the appellants satisfied me of the circumstances under which the words "warlike operations, whether before or after a declaration of war" were added to the common form of warranty against consequences of hostilities which had been previously in use. I think, however, that knowledge of these circumstances does not necessitate, if it would justify—which I suppose it would not—any departure in this case from the rule that the language of the contract is to be construed according to its plain meaning. Warlike operations before or after a declaration of war, and warlike operations of States

(1) [1919] 1 K. B. 575, 581.
(2) [1917] 2 K. B. 769; [1918] 2 K. B. 879.
(3) [1918] 2 K. B. 879.

between which war begins without a declaration of war, are manifestly included in the warranty. The case does not seem to me to raise the question, which was incidently considered in the arguments for the appellants, whether warlike operations on the part of subjects of belligerents, undertaken on their own responsibility, could fall within a warranty against consequences of warlike operations. The decision of Bailhache J. in the case which was mentioned (1) of a merchant ship which rammed a floating object upon the supposition that it was an enemy submarine, and was held to be covered under a policy against consequences of warlike operations in respect of damage thereby suffered, depends on its own facts, and is not now under review. The considerations which were material there do not arise here. Neither the *Petersham* nor the *Serra* committed any act of belligerency. As was pointed out by Bailhache J., it is not suggested that the *Petersham's* occupation at the time of her loss was other than peaceful. The present insurance, as an insurance against consequences of warlike operations, was, I am satisfied, an insurance only against consequences of warlike operations in the proper sense of the terms "war" and "warlike" as they are used in relation to the warfare of belligerent States. (See Hall on International Law, 7th ed., p. 61, § 15.) The operation on the part of a combatant Power, which is relied upon by the appellants in their petition of right, is the issue by the Lords Commissioners of the Admiralty of "directions and instructions with a view to safeguarding British and other mercantile tonnage from possible enemy action and the consequences thereof." As is pointed out by the learned judge, these regulations were of a perfectly general character, not issued specifically to the *Petersham*, and not issued with regard to the voyage she was on. The issuing of the regulations was a purely precautionary measure, and there was nothing in the situation of the *Petersham* at any material time which made the observance of them a warlike operation. The statement of the facts appears to me to lead inevitably to the conclusion stated in the judgment under appeal. I think, therefore, that the appeal fails.

(1) *Henry & MacGregor, Ld.* v. *Marten*, 34 Times L. R. 504.

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In the case of the *Matiana*, the underwriters against war risks appeal from the judgment of Bailhache J. based upon a finding that the stranding and loss of this vessel were the consequences of a warlike operation. The learned judge held that sailing with convoy is a warlike operation, and on that ground held the appellants liable.

The *Matiana* had sailed from Alexandria for London with a cargo of cotton, together with three other merchant steamships, under the protection of a convoy of warships. Certain material facts with regard to the voyage were admitted. The *Matiana* would not have been allowed to sail except under convoy. Her master was bound to obey the orders of the naval officer in command of the convoy. That officer chose the route of the voyage. The region in the Mediterranean which the vessel had to traverse was frequented by enemy submarines, The object of the commander of the convoy was to bring the *Matiana* and the other merchantmen safely through this region. There were allegations of negligence which the learned judge found not proven, and as to which it is sufficient to say that they had relation to the master's unquestioning compliance with his sailing orders, notwithstanding that the course or the set of the currents in the locality carried his vessel nine miles to the north of the course on which he assumed that she was, and headed her directly toward the rocks of the Keith Reef on which she stranded. The learned judge did not deal with the contention of the appellants that the burden of proof upon the respondents included proof that the vessel was not lost by reason of negligence.

The question whether sailing with convoy was in the present case a warlike operation cannot be satisfactorily discussed without defining the terms "convoy" and "sailing with convoy." Both are commonly used, and were used in the Court below and in this Court, with ambiguous meanings. "Convoy" can, without departure from common use, be applied indiscriminately to the naval escort, the protected merchantmen, and the flotilla, which includes both. "Sailing

with convoy" can be given a like varied meaning. In legal terminology, however, "convoy" is the proper name of the protecting naval force, and "sailing with convoy" is the sailing of merchantmen under protection of the King's ships. (See Park's Law of Marine Insurance, 8th ed., p. 693.) This clearly appears upon examination of the statutory provisions as to convoy, which extend from the Naval Discipline Act, 1661 (13 Car. 2, stat. 1, c. 9. s. 13), to the Naval Discipline Act, 1866 (29 & 30 Vict., c. 109, ss. 30, 31), now in force. I select as illustrative phrases the following: "ships appointed for convoy" in the Statute of Charles II.; "to sail . . . . unless under the convoy and protection of such ship or ships, vessel or vessels, as shall or may be appointed for that purpose," and "to continue with such convoy . . . . and . . not wilfully separate or depart therefrom . . . . without order or leave for that purpose from the officer having the command of such convoy," in ss. 1 & 2 of the Act of 1803 (43 Geo. 3, c. 57), which prohibited sailing without convoy. I refer also to ss. 30 & 31 of the Act of 1866.

In the present case some evidence was given of the practice as to convoy in the Mediterranean in 1918, but it added nothing to the state of facts which was to be presumed from compliance with the general law. All that can be said upon the facts proved is that the convoy was appointed by the Admiralty for the *Matiana*, that she sailed with such convoy, and that her master was thereupon bound to conform to the orders of the commander of the convoy, including that which set the course of the vessel at the time in question.

Bearing in mind the distinction between convoy and vessels under convoy, it becomes necessary to consider the case with regard to each. To say that the sailing of merchantmen with convoy in time of war is necessarily a warlike operation, is to make too general a statement. Neutral convoy has been well known in warfare. The armed neutrality of the Northern Powers of Europe between 1800 and 1810, and the provisional definition inserted in the Declaration of London a few years since with regard to "neutral vessels under the convoy of a man-of-war flying the same flag," are sufficient reminders of

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this fact. Further, convoy has in past times been appointed for protection against pirates. See *Jeffery* v. *Legender* (1) as reported by Serjeant Levinz, who was engaged in the case.

It is necessary to enquire whether in the present case there was a warlike operation of the warships engaged, or of the merchantmen, or of both. Counsel for the respondents seemed to me to assume that all operations of the warships of belligerents on the high seas must be warlike operations, and presumably that any stranding of such a ship would be a stranding in consequence of warlike operations. That could be tested as matter of argument if it were assumed that the course taken on the voyage here in question had put a vessel of the naval convoy in the position in which it actually put the *Matiana*. Let it be assumed, however, that the naval vessels of the convoy were engaged in a warlike operation. Can it be said that the *Matiana* was so engaged ?

Three alternative modes of stating the case of the *Matiana* were brought under discussion. She was said to have been navigated under naval orders for the belligerent purpose of " breaking through " enemy forces known to be operating in the region in question. She was also said to have been engaged with the convoy in defeating a blockade of the enemy against British trade coming westward from Mediterranean ports, and to have been stranded in effecting that object. The control of merchant shipping assumed by the Admiralty under the Defence of the Realm Act, 1914, and Regulations made thereunder, and carried out by regulations as to convoy and other matters, was also said to be a warlike operation, and the sailing of the *Matiana* under that control to be part of the operation. Whether these were warlike operations, and whether the *Matiana* was engaged in these warlike operations or one of them, is matter of fact. I am satisfied that in point of fact the *Matiana* was never ordered to do, never did, and never participated in, any warlike operation or belligerent act. She never lost her character of a merchant ship carrying merchandise. She sailed under naval protection in circum-

(1) (1691) 3 Lev. 320.

stances of peril, but at all times scrupulously observed the warranty contained in her insurance against war risks that she should be employed only in commercial trading. The stranding, therefore, was not due to any warlike operation in which she was herself engaged.

So far as enemy action was concerned, it is no doubt true that the course laid down by the commanding officer of the convoy was taken by reason of the presence of enemy submarines on the usual route—the route from which the *Matiana* was diverted. There was, however, no evidence of the presence or reported presence of a submarine within range of the convoy and her charge at any material time. The deviation was made by way of precaution and not because of any immediate action of the enemy. The *Matiana* was not stranded in any effort at escape from a present danger. As was pointed out by Lord Sumner in *Becker, Gray & Co.* v. *London Assurance Corporation* (1), there is a real distinction between "lost by perils insured against and lost in avoiding them, loss by capture and loss by fear of it." In the present case the stranding was not an immediate consequence of any warlike operation of the enemy.

So far as the King's forces were concerned, there was no more than the choice of a course by which warlike operations could be avoided, but by means of which a convoyed vessel was accidentally put upon the rocks. The order of events in the chain of consequences is this: the state of war, the enactment of Defence Regulations, the appointment of convoy, and the adoption of an ill-chosen course. To my mind these considerations show that the owners of the *Matiana* have no claim upon the underwriters against war risks.

It is unnecessary to consider the questions raised with regard to negligence, or in particular, the complaint of the appellants that the absence from their case of affirmative proof of negligence was held to be conclusive of that matter as against them. The appeal succeeds upon the ground that the loss was not within the terms of the policy.

(1) [1918] A. C. 101, 111.

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ATKIN L.J. read the following judgment :—

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This petition of right is brought upon the terms of a charterparty by which the Admiralty chartered for an indefinite time the suppliants' steamship *Petersham*. The material clauses of the charterparty are clauses 18 and 19. The intention of the parties, stated broadly, is plain. The suppliants were to bear the sea risks ; the Admiralty were to bear the war risks as defined in clause 19. The wording of clause 19 is not as clear as it might be. The risks said to be undertaken are those which would be excluded from an ordinary policy by the ordinary Institute f.c. and s. clause. Logically to ascertain the effect of this, one has to see what risks are included in the ordinary policy, and then to consider the effect of the exception clause. If the exceptions were wider than the risks insured, then, to the extent that they were wider, they would be irrelevant. But the case was argued before us on the footing that the Admiralty had undertaken to be liable for the risks mentioned in the exception clause as though they had issued a policy to cover such risks ; and for the purpose of this case I shall assume that such is the true construction.

For the purposes of construction, however, it is, I think, relevant to consider how the contract comes to be framed in these words, bearing in mind the traditional values of most of the phraseology of contracts of marine insurance as established by commercial usage and judicial decisions of many countries. The risks expressed to be taken by the insurers in the body of an ordinary Lloyd's policy, so far as they are relevant to war, do not appear to have altered since the time of the Napoleonic wars. They are now in the First Schedule to the Marine Insurance Act, 1906 (6 Edw. 7, c. 41), as they were then, men-of-war, enemies, takings at sea, arrests, restraints, and detainments of all kings, princes, and people, together with the general clause, all the perils, etc., which is to be construed ejusdem generis. The exception clause has grown. It appears to have begun in Napoleonic times as free of capture and

seizure in ports of discharge: it developed to free of capture and seizure generally. By 1863 it was free of capture, seizure, and of hostilities or the consequences thereof. In 1883 a general meeting of the Underwriting Community of the United Kingdom assembled at Lloyd's, adopted the clause in its present form, which adds to hostilities, "warlike operations." (Owen on Marine Insurance, Notes and Claims, 3rd ed., pp. 8 & 9.) I have not found an earlier use of the words "warlike operations," and I think it probable that they arose out of the operations of our fleet at Alexandria, operations conducted against persons who were in rebellion against a friendly Power, and without a state of war having been declared—not operations in a war, but warlike operations. The other point to be mentioned is, as already noticed, that the words in their original collocation are meant to express exceptions from already ascertained risks, namely, those expressed in the ordinary policy of marine insurance.

The words have to be applied to the loss in question. The facts as stated in the petition are admitted. The *Petersham* appears to have been making an ordinary commercial voyage from Bilbao to Glasgow with a cargo of iron ore. She was under requisition by the Admiralty on the terms of the charter T. 99 which is entitled "collier or oiler transport"; but does not expressly restrict the kind of cargo to be carried. She was run into by the steamship *Serra*, which struck her on the starboard side and sank her. The *Serra* was a steamship belonging to the port of Bilbao, and was engaged on an ordinary commercial voyage from Swansea to Barcelona via Bilbao with a cargo of patent fuel. Both ships were navigating without the usual navigation lights: the *Petersham* as alleged "in accordance with Admiralty regulations and instructions"; the *Serra* as alleged "by direction of the Admiralty." It was assumed before us that both ships were so sailing without lights in pursuance of orders made under the Defence of the Realm Regulation 37: "Every vessel shall comply with such regulations as to the navigation of vessels as may be issued by the Admiralty or Army Council, and shall obey any orders given, whether by way of signal or otherwise, by any officer in

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command of any of His Majesty's ships, or by any naval or military officer engaged in the defence of the coast." Such order was made under the Defence of the Realm Consolidation Act, 1914 (5 Geo. 5, c. 8), which provides (by s. 1) that "His Majesty in Council has power during the continuance of the present war to issue regulations for securing the public safety and the defence of the realm," and may by such regulations provide for the punishment of offences against the regulations, and "in particular against any of the provisions of such regulations designed," and so on: "to secure the navigation of vessels in accordance with directions given by or under the authority of the Admiralty."

It is admitted that, owing to the absence of the usual navigation lights, the collision could not have been avoided by reasonable care and skill.

It is said, therefore, that the loss here arose from warlike operations and the consequences thereof. First it is said that navigation without lights was in itself a warlike operation. The absence of lights was for the protection of the vessels from enemy submarine attack, which formed part of the declared belligerent policy of the enemy. The sinking of the vessel was, therefore, a consequence of a warlike operation, since it is admitted that the absence of lights made it impossible to avoid the collision by reasonable care and skill. Secondly, it was said that at any rate the Admiralty order was a warlike operation: and the sailing in pursuance of the order and the sinking were consequences.

The orders in operation at the time of the collision will be found in the Defence of the Realm Manual, 5th ed. revised to February 28, 1918, at pp. 358 & 359. "In areas in which submarines or raiders may be met vessels are to be carefully darkened from sunset to sunrise and are to proceed without navigation lights. These lights must be so arranged that they can be instantly shown to avoid collision and extinguished as soon as the danger of collision is past. Navigation lights when specially ordered to be shown must be dimmed to a visibility of less than two miles." The order then proceeds to give directions for carrying out the order that visibility

should be dimmed under a heading "Admiralty War Instructions for British Merchant Vessels."

It is not necessary in the present case to consider how and why the *Serra* became liable to obey British Admiralty instructions. The case was argued on the footing that there was no distinction between the two vessels in this respect.

Was the loss, under these circumstances, a consequence of warlike operations? I cannot think that it was. The clause must be read as a whole in connection with the context, and so reading it, I think that warlike operations connote the attributes of operations that form part of a series of acts of war, belligerent acts by combatant forces, whether offensive or defensive. "Hostilities" imply enemy nations at war with one another. Warlike operations are included in the word "hostilities," but may range outside it: as, for instance, where armed force is being used for putting down rebellion, or where national territory is being protected in anticipation of war by defensive methods appropriate to war, that is to say, by laying down mines. I do not think that warlike operations need be directed to the immediate hurt of the enemy: I incline to think that during war almost any action or movement of the combatant forces in the course of their combatant duties while exercised in the area of war, could be included. A ship is sunk by collision with a destroyer navigating without lights in the course of patrolling in search of submarines: *Ard Coasters Ltd.* v. *The King* (1), or is sunk by collision with an armed warship steaming at full speed without lights, in the course of war: *British and Foreign Steamship Co.* v. *The King.* (2) In both these cases I should have thought it clear that the vessel causing the loss was engaged in a warlike operation, and the only question that could arise would be, Was the operation the proximate cause of the loss? It is to be observed that in the last case it was admitted on the part of the Crown that steaming without lights on the part of both vessels was a warlike operation. In view of that admission and the undisputed facts in that case, and in view of the express reservation of the general question in the

(1) 35 Times L. R. 604. (2) [1918] 2 K. B. 879.

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judgment of Scrutton L.J., I cannot treat the decision as governing the present case. I also think that a non-combatant while at sea may, for purposes of defence, engage in an act of war: a warlike operation. This is the case of the merchant ship that rams, or attempts to ram, an enemy submarine, held, as I think rightly, to be a warlike operation, even though it be doubtful if the object rammed was in fact an enemy submarine: *Henry & MacGregor, Ltd.* v. *Marten.* (1)

But the above cases—and they may be multiplied—appear to me to be essentially different from a loss suffered from a collision between two vessels, both of which are engaged in ordinary commercial traffic. The operation is the operation of conveying goods by sea from one commercial harbour to another. The risk of collision is an ordinary risk of such an adventure. It is true that the voyage is performed in war time and under war conditions. It is an operation in war, but not a warlike operation. Like many other peaceful operations conducted in time of war, it is conducted under different conditions to those of peace. The risks are increased; the risk of collision by sailing without lights; the risk of stranding by sailing on unaccustomed routes; the risk of foundering by difficulties in securing, when needed, necessary repairs. But to increase marine perils by reason of war is not to convert them into war perils. The warlike operation is said to be sailing without lights: I asked during argument whether, while the vessels were sailing by day, they were engaged in a warlike operation, or did they begin the warlike operation when the sun went down, and I am not conscious of having received an answer. If regard is to be had to the natural meaning of the words, it can be tested by reference to land operations. An omnibus is proceeding with dimmed lights in darkened streets in pursuance of Government orders made for the protection of a city and its inhabitants from attack by hostile aircraft; is the omnibus engaged in a warlike operation? And if by reason of the lack of light it collides with a wayfarer or another omnibus, is the resulting injury the consequence of a warlike operation? And was the wayfarer

(1) 34 Times L. R. 504.

similarly engaged in a warlike operation? Lights are, in pursuance of the same Order, darkened in a public building, and a visitor, by reason thereof, falls and injures himself: is he the victim of a warlike operation? To these inquiries the sole answer of counsel was a courteous protest against the introduction of such mundane matters into the esoteric mysteries of marine insurance.

I think, in the contention of the appellants, the major premise is flung far too wide. I have indicated what I conceive to be the necessary restrictions as to the meaning of "warlike operations." It is unnecessary to deal with all the possible cases that may or may not come within the words, but in my opinion the present case is not a loss within clause 19; and I agree that the appeal should be dismissed with costs.

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This case raises a similar question. Here the claim is not under a charterparty, but under a policy of marine insurance by which the assured are covered against war risks in the following clause so far as material. "This insurance is only to cover the risks of capture, seizure and detainment by the King's enemies and the consequences thereof, or any attempt thereat, and all consequences of hostilities or warlike operations by or against the King's enemies, whether before or after declaration of war." Clause 5 of the policy contains warrantie which are as follows: that the ship should be employed only in commerce, and should comply, so far as possible, with the orders of His Majesty's Government, and that the ship shall not enter into any blockaded port. The vessel in question, the steamship *Matiana*, while sailing in the Mediterranean with convoy on a course directed by the senior naval officer in command of the escorting ships, stranded on Keith Reef, which is situate N. of the Gulf of Tunis, N.E. of Biserta. She was carrying a cargo of cotton from Alexandria to the United Kingdom, and was in company with three other vessels similarly engaged. The vessels had been taking a course more to the north than usual, in order to avoid a submarine-infested

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area; and a couple of hours before the stranding, had been directed to take a westerly course by a previously-arranged direction of the commander of the escort. The master of the *Matiana*, when he received the pre-arranged request, was about nine miles out of his reckoning: as he says, was also the captain of one of the escorting vessels. It was suggested that negligence on the part of the master of the *Matiana*, or of the commander of the escort, was proved; but the judge rightly held, as I think, that this contention, even if relevant, failed. It was further contended by the underwriters that to establish proximate causation the plaintiffs had to prove affirmatively that negligence of the master did not contribute to the loss; and that such proof failed. In the view I take, it is unnecessary to consider these questions, and I express no opinion upon them. There is no evidence to show why the commander of the escort ordered the course to be taken which exposed one or other of the convoyed ships to the risk of striking the reef in question. It is said that the merchant ships sailing in convoy were engaged in a warlike operation, and the loss was the consequence of the warlike operation. The learned judge has approved of the contention: his reasons are to be found expressed in his judgment in *Britain Steamship Co.* v. *The King* (1), which he delivered after hearing the argument in this case; and in his judgment in this case. (2) With the distrust of my own judgment I always feel in differing from Bailhache J. I do not agree with the decision. It appears to me fallacious to identify the merchant vessels sailing with convoy with the warships which escort them. The warships are engaged in the warlike operation of protecting non-combatant vessels from the enemy. The merchant vessels are engaged in the peace-like operation of conveying merchandise by sea. The sheep are not the shepherd; and are not engaged in the operation of shepherding. It is true that the merchant ships have to obey the instructions of the commander of the warships. Sailing under convoy has been an incident of mercantile ventures in time of war for centuries; and for many years has been the subject of legislation. The Convoy Act in force

(1) [1919] 1 K. B. 575. (2) [1919] 1 K. B. 632.

in the early years of the 19th century (43 Geo. 3, c. 57) will be found set out in Abbott on Shipping, 4th ed., 1812, at p. 577. The preamble is: "Whereas it will add to the security of trade, to prevent ships sailing without convoy, except in certain cases." The present statutory provision regulating the respective duties of commanders of the escort and masters of the merchant ship, apart from the temporary provisions of the Defence of the Realm Regulations, are to be found in the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), and Navy Discipline Act, 1866 (29 & 30 Vict. c. 109). Sects. 30 and 31 of the latter Act impose a duty on a naval officer, amongst other things, not to demand money from any merchant or master for convoying any ships or vessels "intrusted to his care" and empower him to enforce his orders by force of arms. The former Act, by s. 46, had already imposed a duty upon the master to obey, under penalty of 500*l.* fine or one year's imprisonment. The lawful orders clearly include orders as to course to be taken. But the fact that non-combatants are in particular circumstances or in particular areas made subject to the orders of combatant officers conducting warlike operations, does not appear to me sufficient ground for inferring that, while obeying those orders, they are engaged in warlike operations. I can imagine that the laws of war might press very hardly upon them if a victorious enemy took the same view.

Following the reasoning I have adopted in the *Petersham* case, I come to the conclusion that the *Matiana* was not engaged herself in a warlike operation. But this is not sufficient in itself to decide the case; for it was urged that at any rate the loss was a consequence of a warlike operation by the commander of the escort in controlling the course of the convoyed ships. I doubt whether the giving of an order in itself can ever be an operation. That which is done under the order constitutes the operation; and to ascertain whether such operation is warlike or not, no doubt one must look to the function of the person giving the order as well as to the nature of the order and the person or persons by whom it is to be performed. But I will assume that in giving the order when he did to take a particular course, the commander was

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performing a warlike operation; was the loss the consequence of it? I think that the clause should be construed in accordance with the general principles of insurance law as covering only the consequences proximately caused by hostilities or warlike operations. For this view one has the great authority of Willes J. in *Ionides* v. *Universal Marine Insurance Co.* (1) intended to be approved, I think, by Lord Halsbury in *Andersen* v. *Marten* (2). It seems to be unnecessary to discuss the precise words in which the necessary relation of cause and effect should be described: for the language has been finally settled in The Marine Insurance Act, 1906, s. 55, sub-s. 1: "Subject to the provisions of this Act, and unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against." This is the statutory rule, and as stated by Lord Sumner, it should always be rigorously applied in insurance cases: *Becker, Gray & Co.* v. *London Assurance Corporation.* (3) In the present case the naval commander changed the course at 9.3 p.m.; at 10 p.m. the order was given to zigzag; and at 12.15 a.m. the *Matiana* struck the Keith Reef. The actual loss was caused by an ordinary sea peril, stranding. It seems to me impossible to say that the naval officer directed her on to the reef; or that her striking was the inevitable or even the probable consequence of his order. That she struck the reef was a mischance. It could not be calculated. It was not proximately caused by the order. It was precisely the kind of mischance that constitutes a marine peril when voyaging on an unknown or uncharted route. No doubt by taking the course she was ordered, she was exposed to the risk of striking the reef; but in my view the true result of the order was merely to expose the ship to a greater chance of suffering a loss from marine peril. A naval order to incur marine risks by taking a dangerous channel, by sailing in a fog-bound area, by navigating at full speed, or, as in the last case, without lights, does not proximately cause the loss, if in

(1) 14 C. B. (N. S.) 259, 289. (2) [1908] A. C. 339, 340.
(3) [1918] A. C. 101, 112.

fact the vessel suffers loss from collision or stranding. The difference between the two channels referred to in the judgment of Erle C.J. in the *Ionides' case* (1) illustrates the point, though I think it needs qualification. The Chief Justice takes the case of a vessel directly compelled by hostilities to navigate a mined channel; loss by mines is a consequence of hostilities; on the other hand, she is similarly compelled to navigate a narrow and dangerous channel, and without negligence is stranded. Loss by such stranding would, in my opinion, not be a consequence of hostilities. I think Erle C.J. would have so decided, though in his illustration, by omitting the special danger of the channel and introducing the element of negligence, the distinction loses some of its value.

For these reasons, consistently with the provisions of the Marine Insurance Act, 1906, and with authority, I feel myself bound to hold that the loss was not from a peril insured against, and that judgment should be set aside and entered for the war risks underwriters. It follows that the plaintiffs' appeal should be allowed and judgment entered for them against the marine risks underwriters.

Appeal in first case dismissed.
Appeals in second case allowed.

Solicitors in first case: *Holman, Fenwick & Willan; The Treasury Solicitor.*

Solicitors in second case: *Waltons & Co.; W. A. Crump & Sons; Rawle, Johnstone & Co. for Hill, Dickinson & Co., Liverpool.*

(1) 14 C. B. (N. S.) 259, 286.

W. I. C.
G. A. S.

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Income Tax—Super-tax—Assessment—Deduction—Income of Partner—Liability to contribute to Reserve Fund—Interest of other Persons in Fund—Payment "reserved or charged" on Income—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 163, 164—*Finance* (1909–10) *Act*, 1910 (10 *Edw.* 7, *c.* 8), *s.* 66.

By the Income Tax Act, 1842, ss. 163, 164, as applied for this purpose by the Finance (1909–10) Act, 1910, s. 66, sub-s. 2, the commissioners in that behalf in assessing the income of an individual for the purposes of the super-tax shall allow a deduction therefrom of (inter alia) every "annual payment reserved or charged thereon whereby the income shall or may be diminished."

A testator by his will devised and bequeathed his business estate to trustees upon trust that if two of his sons, of whom the appellant was one, should carry on the business in partnership during their joint lives then the trustees should stand possessed of the business estate in trust for them in equal shares and that upon the death of either son they should hold his share upon trust for other persons and subject thereto for the surviving son. By a deed of covenant between the trustees and the testator's said sons the latter covenanted that they would carry on the business on the terms of articles of partnership and would, in each half year of the partnership, out of the net profits thereof as provided by the articles of partnership set aside and hold a reserve fund as therein mentioned for recouping any loss which might thereafter happen to the business estate; the object of the deed being to preserve that estate for the persons entitled in remainder. The articles of partnership provided that every half year out of the net profits of the business 12 per cent. should be set apart for the purposes of the reserve fund and subject thereto for the partners in equal shares:—

Held, that a contribution made by the appellant for a year to the reserve fund out of his share of the profits of the business was an annual payment reserved or charged upon his income whereby it was or might be diminished within the meaning of the above provisions, and therefore that the Commissioners in estimating his income for the purposes of the super-tax should allow that sum to be deducted therefrom.

CASE stated by the Commissioners for the Special Purposes of the Income Tax Acts.

Dr. Alonzo H. Stocker by his will dated October 21, 1902, gave, devised and bequeathed to his trustees (inter alia) certain freehold and leasehold property used by him for the purpose of his business as a proprietor of asylums for the insane, together with the goodwill of the business and certain furniture, fittings and other articles in and about the property

and all the other assets belonging to him in connection with the business including book debts, which property, furniture and assets were described in the will as his "business estate" upon trust that if his two sons A. H. Stocker, the appellant, and H. G. Stocker should both be living at his death and should within six months after his death execute such articles of partnership as thereinafter mentioned for the carrying on and continuance of the business then his trustees should stand possessed of his business estate in trust for his said two sons in equal shares subject as thereinafter provided. And he declared that the articles of partnership to be so executed by his said sons should provide for a partnership between them during their joint lives upon equal terms. And he directed that upon the death of either of his said two sons the share of his said son so dying in his business estate should be held by his trustees upon trust out of the income thereof to pay an annuity of specified amount to the widow if any of his said son so dying during her life. And subject thereto in trust for such sons of his said son so dying as should attain the age of twenty-one years as therein mentioned. And if no son of his said son so dying should attain the age of twenty-one years then after the death of his said son and subject to the above-mentioned annuity his trustees should stand possessed of the share of his said son so dying in his business estate upon trust to raise thereout a sum of specified amount and pay the same to the daughter or daughters of his said son as therein mentioned. And subject thereto the share of his said son so dying should belong to the survivor of his said two sons. And he empowered his trustees until his business estate should be transferred to some person or persons absolutely entitled thereto to permit the business to be carried on by his said sons or either of them or by any other person or persons interested therein under his will or themselves to carry on the same in such manner as they might think fit with powers to use or permit to be used in his said business, his business estate and such other moneys forming part of his estate as they should think fit.

The testator died on April 24, 1910.

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As the appellant and his brother desired to have possession of the "business estate" for the purpose of carrying on the business, the trustees, with a view to the preservation of that estate in the interests of the persons who might be entitled to it in remainder under the will, required a reserve fund to be set aside for the purpose of recouping any loss which might thereafter happen to the business estate.

By an indenture made on September 28, 1910, between the trustees of the will of the first part, the appellant of the second part, and H. G. Stocker of the third part, it was provided in consideration of the transfer by the trustees to the appellant and A. H. Stocker of the testator's business estate and the assignment by the former to the latter of the book debts of the business (clause 1) that the appellant and H. G. Stocker would continue to carry on the business upon the terms to be provided by articles of partnership which they were forthwith to execute; (clause 4) that the appellant and H. G. Stocker would during the continuance of the partnership carry on upon the premises the said business in accordance with the said articles of partnership and to the best possible advantage; (clause 5) that the appellant and H. G. Stocker would on the determination of the partnership deliver up to the trustees possession of the property then forming the business estate in good repair and condition; (clause 8) "The said Alonzo Harold Stocker and Hubert Goodman Stocker will in each financial half year of the partnership out of the net profits thereof as provided by the said articles of partnership set aside a reserve fund as therein mentioned, and such reserve fund shall be held by the said Alonzo Harold Stocker and Hubert Goodman Stocker for the purposes of recouping any loss which may hereafter happen to the testator's business estate, and no part of such reserve fund shall be expended by the said Alonzo Harold Stocker and Hubert Goodman Stocker for any purpose whatsoever except with the consent in writing of the trustees or trustee first had and obtained. Provided always and it is hereby declared that the covenant in this clause contained so far as it provides for the setting apart of any sum as a reserve fund shall as and when the total amount of the reserve

fund amounts to the sum of 10,000*l.* remain in abeyance, but shall come into force again whenever the total amount of the reserve fund is from any cause whatsoever reduced below the said sum of 10,000*l.* . . . . " And it was by that indenture further agreed that if the appellant and H. G. Stocker should fail to perform and observe any of the covenants and conditions on their or his part to be performed and observed therein contained, then the trustees should be at liberty upon giving twelve calendar months' notice in writing to require the appellant and H. G. Stocker to deliver up to them possession of the freehold and leasehold premises and the chattels and effects used by them as part of the partnership business.

By articles of partnership dated September 29, 1910, between the appellant and H. G. Stocker, in compliance with the will and the above mentioned indenture it was provided (clause 1) that the appellant and H. G. Stocker would become partners in the business on the terms thereinafter expressed; (clause 2) that the partnership should continue during their joint lives; (clause 10) that all the expenses and losses and interest on capital payable to the respective partners, except losses which the partners might think fit to pay out of the reserve fund thereinafter mentioned (with the consent of the trustees so far as it might be required under the deed of covenant), should be paid out of the receipts and earnings of the business, and in case of deficiency by the partners in equal shares; (clause 11) that out of the net profits of the business as appearing upon the settlement of every half-yearly account a sum calculated at the rate of 12*l.* for every 100*l.* (not exceeding 500*l.* each half year) of the net profit so remaining should be set apart and carried to a separate account to be called the " reserve fund," and that the sums for the time being standing to the credit of the reserve fund should from time to time be applied for the purposes set out in the deed of covenant or for such other purposes as the trustees or trustee might from time to time authorize, and subject thereto the reserve fund should belong to the partners in equal shares, provided always, that if and whenever the reserve fund amounted to 10,000*l.* the same should not be further augmented

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by the retention of any part of the subsequent profits unless the partners should so agree; (clause 12) that the partners should be entitled to the net profits of the business after making provision for a reserve fund in equal shares; (clause 34) that upon dissolution of the partnership by act of the trustees the proceeds arising from the sale of its assets were to be applied as therein mentioned, including payment to each partner of his share of the reserve fund after complying with the provisions of the deed of covenant relating thereof.

The sums carried to the reserve fund had never been claimed or allowed as a deduction for the purposes of the assessment upon the partnership to income tax.

For the year April 5, 1915, to April 5, 1916, the appellant made a contribution to the reserve fund of 377*l.*

For the year April 5, 1916, to April 5, 1917, the respondents assessed the appellant to super-tax, pursuant to the Finance (1909–10) Act, 1910, s. 66, in the sum of 4896*l.*, the assessment being based upon the appellant's statutory income for the previous year above mentioned, in which they included the said sum of 377*l.*

The appellant appealed against the assessment to the Commissioners for the Special Purposes of the Income Tax Acts. It was contended for the appellant that the articles of partnership provided for the reserve fund out of the profits of the business, and that the trustees had absolute control over the "business estate"; that the reserve fund could not come into the possession of the appellant without the sanction of the trustees, who had the right under the deed of covenant to call in the whole of the assets, and, in fact, had the power to cause the reserve fund (less the interest thereon) to become the absolute property of the remaindermen; that the appellant had no control, ownership (less interest on capital) or even post mortuary powers of disposition of the reserve fund, except a power of appointment to a person or persons of a specified class; that the provisions as to the reserve fund in the articles of partnership were necessary and proper; and that the sum in question did not constitute income to the appellant for the purposes of super-tax.

It was contended for the respondents that in the events which had happened the appellant and his brother were entitled to the whole income of the testator's business estate, and that there was no provision in the will imposing on the appellant the duty of forming a reserve fund; that by virtue of the Income Tax Acts the amount to be included in computing the total income of the appellant for super-tax purposes in respect of his income from the partnership was the share to which he was entitled under the articles of partnership of the profits of the partnership calculated according to the rules and directions of the Income Tax Acts; that the sums credited to the reserve fund under the articles formed part of the profits of the partnership to which the partners were entitled, and that having regard to the terms of the will the provisions of the deed of covenant and articles of partnership as to the setting aside of part of these profits to a reserve fund amounted only to an application of profits in an agreed manner; that in the event of a dissolution of the partnership or a sale of the assets the appellant would be entitled to one-half of the said fund; and that the sum in dispute had been properly included in the assessment which should be confirmed.

The Special Commissioners were of opinion that the sum of 377*l.* constituted part of the appellant's income, and they confirmed the assessment.

Hon. W. Finlay K.C. and *Gattie* for the appellants. The appellant is not liable to be assessed to super-tax in respect of the sum set apart by him out of his share of the profits of the partnership business as a contribution to the reserve fund.

Under the Finance (1909–10) Act, 1910, s. 66, sub-s. 1 (1), the super-tax is to be charged, levied and paid in respect of the "income of any individual" the total of which exceeds the amount there specified; and under sub-s. 2 (1) for the purposes of the super-tax the total income of any individual is to be taken to be his total income for the preceding year

(1) For the relevant provisions of this Act and of the Income Tax Acts see the note at the end of this report.

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estimated as the total income is estimated for the purpose of exemptions and abatements under the Income Tax Acts. Under that section for the purposes of the super-tax the income of a partner from the profits of the partnership is to be taken to be the share of these profits to which he is entitled under the partnership agreement for the year preceding the year of assessment to super-tax, such profits being ascertained on an average of the three preceding years: *Gaunt* v. *Inland Revenue Commissioners.* (1)

Though the sums set apart out of the profits of the partnership for the reserve fund were necessarily part of the profits of the partnership as a whole, the contributions made by the partners to these sums formed no part of their separate incomes as partners. By the deed of September 28, 1910 (clause 8), the appellant and his brother covenant with the trustees of the will that they will out of the net profits of the partnership set aside the reserve fund to be held by them for recouping the business estate for the benefit of the remaindermen under the will and that no part of that fund shall be expended by them except with the consent of the trustees; and by the articles of partnership they stipulate (clause 1) that out of the net profits of the business 12 per cent. shall be set apart as a reserve fund to be applied for the purposes set out in the deed of covenant or authorized by the trustees, and (clause 12) that they shall be entitled to the profits of the business after making provision for the reserve fund. By these instruments the partners not only covenant to set apart the reserve fund for the purposes of recouping the business estate in the interests of the remaindermen, but they in effect declare themselves trustees of that fund for these purposes. In either view the partners are under an absolute legal obligation to hand over 12 per cent. of the profits of the business to the reserve fund in which various persons are interested and can claim no part of that percentage of the profits for themselves as partners, and only after they have fulfilled that obligation can the remaining 88 per cent. of the profits be distributed between them as partners. If the trustees with the

(1) [1913] 3 K. B. 395.

consent of the beneficiaries had handed back to the partners the sums contributed by the latter to the reserve fund it seems plain that the profits of the partners as such would have been increased by the amount of these sums. Again, if the covenant had been in the terms that the partners should hand over a fixed sum, say 500*l.* a year, to the reserve fund, and in a particular year the profits of the business had amounted to that sum and no more, it seems equally obvious that in that year the partners as such would themselves have had no income from the business. As the appellant's proportion of the 12 per cent. of the net profits of the partnership set apart for the reserve fund is not part of his share of the profits as a partner it is no part of his income as an "individual" within s. 66 of the Act of 1910, and therefore super-tax cannot be charged against him in respect of it.

By the Finance Act, 1907 (7 Edw. 7, c. 13), s. 20, where an individual carries on business in partnership, his income from the partnership for a given year may be treated separately for the purpose of a claim to exemption from or abatement of duty.

As the appellant did not make the contribution from his share of the profits of the business to the reserve fund voluntarily, but because he was bound to make it by covenant or under a trust, he is entitled under s. 66, sub-s.2, of the Act of 1910 (1), applying for this purpose s. 164 of the Income Tax Act, 1842 (1), to claim exemption or abatement from super-tax in respect of that contribution as being a "payment reserved or charged" upon his income whereby it is or may be diminished within the meaning of the latter section.

Sir Ernest Pollock S.-G. and *T. H. Price* for the Commissioners of Inland Revenue, respondents. The sum contributed by the appellant to the reserve fund is income in respect of which he is liable to be assessed to the super-tax.

The Finance (1909-10) Act, 1910, provides s. 66, sub-s. 1, that the super-tax shall be charged upon incomes exceeding the amount there specified, sub-s. 2 that for the purposes of the super-tax the total income of any individual is his

(1) See the note at the end of this report.

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total income for the previous year estimated as the total income is estimated for the purposes of exemptions and abatements under the Income Tax Acts; and s. 72 that the tax shall be assessed as therein provided. The Income Tax Acts provide for the assessment of income tax duty, and the Income Tax Act, 1842, provides, s. 163, that any person chargeable to income tax duty who shall prove that the aggregate annual amount of his income is less than is there specified shall be exempted from duty; and s. 164 that every person claiming exemption shall set forth (inter alia) the amount of his income and every "annual payment reserved or charged thereon, whereby the income shall or may be diminished," and his claim if not objected to may be allowed. Under the Income Tax Acts as soon as profits are earned in sufficient amount the person to whom they are payable, whoever he may be, is liable to income tax duty in respect of them except in so far as he can show that he is entitled to exemption or an abatement under ss. 163 and 164 of the Act of 1842. The super-tax imposed by the Act of 1910 is an additional income tax charged in respect of the income of any individual exceeding the amount there specified (*Brooke* v. *Inland Revenue Commissioners* (1), per Atkin J. (2) and per Swinfen-Eady L.J. (3)) which he is equally liable to pay unless he can show that he is entitled to exemption or abatement under the sections already mentioned of the Act of 1842.

The appellant cannot be heard to say that his contribution to the sum set aside for the reserve fund is not income subject to taxation. That sum was set apart out of the net profits of the business pursuant to clause 11 of the articles of partnership. As there were net profits of the business of sufficient amount the whole of these profits including the sum so set apart for the reserve fund was income for the purposes of income tax (*Mersey Docks and Harbour Board* v. *Lucas* (4) and *Paddington Burial Board* v. *Inland Revenue Commissioners* (5)), and the share of each partner in these profits was equally income for the purposes of the super-tax.

(1) [1917] 1 K. B. 61; affirmed [1918] 1 K. B. 257.
(2) [1917] 1 K. B. 61, 68.
(3) [1918] 1 K. B. 257, 266.
(4) (1883) 8 App. Cas. 891.
(5) (1884) 13 Q. B. D. 9.

The partners in undertaking to set apart the reserve fund to be held by the trustees of the will for the purpose of recouping any loss to the business estate were not making it over absolutely to other persons. Under the will the interest of the partners in the business estate is not limited to a mere life interest, but subject to certain contingencies is an absolute interest, and the entire control of the estate is in their hands. The articles of partnership by clause 11 stipulate that the sums set apart for the reserve fund shall subject to their being so set apart belong to the partners in equal shares as their own money. The deed of covenant between the partners and the trustees, by which the partners covenanted to set apart the reserve fund, was entered into by the partners voluntarily and not under any compulsion, its real object being to provide a security for the partners inter se which would meet their own liabilities in respect of the business. Pursuant to these instruments the partners handed over their contributions for the reserve fund to the trustees as bankers to hold for the parties interested in the business estate among whom the partners themselves are the true beneficiaries. Consequently the appellants' contribution to the reserve fund was not an "annual payment reserved or charged" upon his income whereby it was diminished within the meaning of s. 164 of the Act of 1842 so as to entitle him to claim in respect of it a deduction of either income tax or super-tax (*Earl Howe* v. *Inland Revenue Commissioners* (1), and see also *Massy* (*Lord*) v. *Inland Revenue Commissioners* (2)), more especially the dissenting judgment of Palles, C.B.

Hon. W. Finlay K.C. replied.

June 24. ROWLATT J. read the following judgment:— In this case the question is whether two brothers who carry on business in partnership in equal shares are to be assessed to super-tax, each of them in 50 per cent. of the profits and gains assessed to income tax, or upon 44 per cent. only, the contention of the appellant being that the lower figure is to be taken because for super-tax purposes the income of the partners

(1) Ante, p. 336.

(2) (1915). For report see [1918] 2 K. B. 598*n*.

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liable to income tax is to be reduced by 12 per cent. (6 per cent. each) payable under the circumstances I shall mention.

Those circumstances are somewhat peculiar. It appears that the father of these two gentlemen carried on a very successful business as proprietor of lunatic asylums. By his will he treated the premises where this business was carried on and all the assets and liabilities of the business, including even the consumable stores, as a separate fund which he called his business estate. To put the effect of the provisions of the will shortly, this business estate stands settled upon two of his sons for life with remainders over, the sons being entitled if they entered into partnership to have the business estate handed over to them for the purposes of carrying on the business. They did enter into partnership, and it is not surprising to find that the trustees of the will were alarmed as to the danger of loss of the assets of the business estate to the prejudice of the remaindermen from whose point of view the whole amount of the business estate, as it existed at the death of the testator, fell to be regarded as capital. Under these circumstances it was part of the arrangement of the partnership as contained in the Articles that 12 per cent. of the net profits of the business should be set aside to form a reserve fund to meet any such losses, and this reserve fund was further provided for by clause 8 of an indenture made between the trustees of the will and the partners, upon the exact effect of which I think this case turns. That clause so far as material is as follows : " The said Alonzo Harold Stocker and Hubert Goodman Stocker will in each financial half-year of the partnership out of the net profits thereof as provided by the said Articles of partnership set aside a Reserve Fund as therein mentioned and such Reserve Fund shall be held by the said Alonzo Harold Stocker and Hubert Goodman Stocker for the purposes of recouping any loss which may hereafter happen to the testator's business estate and no part of such Reserve Fund shall be expended by the said Alonzo Harold Stocker and Hubert Goodman Stocker for any purpose whatsoever except with the consent in writing of the trustees or trustee first had and obtained."

It seems to me that not only did the partners covenant to set aside 12 per cent. and not only could the dissipation of the reserve fund be restrained by injunction, but that the reserve fund became a trust fund for the protection of the remaindermen, so that in case of bankruptcy it would not pass immediately to the trustees for the general creditors but would be applicable in the first instance solely for recouping any loss which might have happened to the business estate. Subject to that trust the fund remained the property of the partners.

There is no doubt that the income for super-tax purposes of each of the two partners equally interested is 50 per cent. of the profits and gains assessed to income tax of the partnership as a whole, unless it can be found that a deduction could be made if the income of the individual had to be estimated in the manner in which total income from all sources is estimated for the purposes of exemption or abatement under the Income Tax Acts (Finance (1909–10) Act, 1910, s. 66, sub-s. 2). That sends one to s. 163 and s. 164 of the Income Tax Act, 1842. Now there does not seem to be any difficulty at all in stating as matter of general law the effect of those sections. I think the matter was always well understood but for the Irish case (*Lord Massy* v. *Inland Revenue Commissioners* (1)), which caused the difficulty in the recent case of *Earl Howe* v. *Inland Revenue Commissioners*. (2) That difficulty has, however, now been removed by the judgment of the Court of Appeal in *Earl Howe's Case*. (3) The case dealt with by these sections is where income has to be divided among the parties entitled to it with the tax upon it, so that, for instance, if out of an income of 1000*l*. received by A., four sums of 200*l*. each have to be handed over to B., C., D. and E. as beneficiaries or encumbrancers bearing their own tax upon such sums, then A.'s income is reduced to 200*l*. upon which he remains out of pocket for the income tax, but may get it back by way of exemption or abatement, if his other circumstances permit it. These sections have nothing to do with the case where

(1) [1918] 2 K. B. 598 *n*.
(2) [1918] 2 K. B. 584; reversed, ante, p. 336.
(3) Ante, p. 336.

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payments have to be made out of income without deduction of income tax. Such payments are merely the application of the income by A. who remains the taxpayer in respect of its receipt, and what a man does or has to do with his income after he has received it and paid tax upon it cannot matter. In other words, these sections can never have the result of reducing the aggregate of the taxable income by reducing, in the case put, the total tax-bearing income of 1000*l.* to A.'s 200*l.* They only provide for the splitting up of the taxable income, tax and all, into five portions.

Now in the present case, if this reserve fund had to be accumulated for the same purpose and for the same ultimate destination in the hands of independent trustees who were to receive it, instead of the partners retaining custody of it, I have no doubt that the partners would be entitled to deduct the income tax on that sum (which of course has already been paid upon the assessment on the partnership) and would be charging the sum so deducted against "other" persons within the meaning of s. 164—namely, those trustees and the beneficiaries of the trust other than themselves, and therefore the result would be that the income of each of them calculated according to the principle required for exemptions and abatements, and, therefore, also for supertax, would be reduced by such 12 per cent. The difficulty in this case is that they themselves are the trustees and that ultimately the fund if not used for the purposes of recouping the business estate any losses which may be incurred by it belongs to themselves. If they were merely to accumulate it for themselves, or even if other people were to accumulate it for them no question could arise. They could themselves disregard or release the other trustees from the observance of any such requirement. But here there is an intervening interest because the remaindermen under the will are entitled to have this reserve fund maintained and the necessary payments made to it, and I think that gives the reserve fund an independent existence, in a separate and distinct beneficial ownership for the time being from the rest of the fund of the partnership.

Accordingly I have come to the conclusion that this 12 per

cent. is an "annual payment reserved or charged" upon the net profits of the partnership whereby the income of each of the partners is diminished, and that the partners are entitled to deduct the duty in setting aside the 12 per cent., and further, that in so deducting it they are charging it against "other persons" within the meaning of s. 164, having regard to the beneficial interest at the moment, which is the interest to be regarded for a computation of this kind.

I am therefore of opinion that the appeal must be allowed with costs.

Appeal allowed.

Solicitors for appellant: *Le Brasseur & Oakley.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

NOTE.—Income Tax Act, 1842, s. 163 ". . . . any person charged or chargeable to the duties granted by this Act, either by assessment, or by way of deduction from any rent, annuity, interest, or other annual payment to which he may be entitled, who shall prove before the commissioners for general purposes, in the manner hereinafter mentioned, that the aggregate annual amount of his income, estimated according to the several rules and directions of this Act, is less than one hundred and fifty pounds, shall be exempted from the said duties, and shall be entitled to be repaid the amount of all deductions or payments on account thereof in the manner hereinafter directed, except so much of such duties as the person claiming such exemption shall or may be entitled to charge against any other person, or to deduct or retain from or out of any payment to which such claimant may be or become liable; . . . ."

Sect. 164: ". . . . every person claiming to be entitled to such exemption as last aforesaid shall, within the time to be limited . . . . deliver or cause to be delivered to the assessor of the parish or place where such claimant shall reside a notice of his claim for such exemption, together with a declaration and statement, signed by such claimant, and in such form as may be provided under the authority of this Act, declaring and setting forth therein all the particular sources from whence the income of such claimant shall arise, and the particular amount arising from each source, and also every sum of annual interest or other annual payment reserved or charged thereon, whereby the income shall or may be diminished, and also every sum which such claimant may have charged or may be entitled to charge against any other person for or on account of the duty made payable by this Act, or which he may have deducted or retained, or may be entitled to deduct or retain, under the authority of this Act, from or out of any payment to which he may be or become liable; . . . . and if the inspector or surveyor shall not object to such declaration within forty days after such transmission, or within such further time as the commissioners, on just cause, shall allow to him to make such objection, it shall be lawful for the said commissioners

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to allow such claim of exemption, and to discharge the assessment . . . ."

Finance (1909-10) Act, 1910 (10 Edw. 7, c. 8), s. 66: "(1.) In addition to the income tax charged at the rate of one shilling and twopence under this Act, there shall be charged, levied, and paid for the year beginning on the sixth day of April, nineteen hundred and nine, in respect of the income of any individual, the total of which from all sources exceeds five thousand pounds, an additional duty of income tax (in this Act referred to as a super-tax) at the rate of sixpence for every pound of the amount by which the total income exceeds three thousand pounds.

"(2.) For the purposes of the super-tax, the total income of any individual from all sources shall be taken to be the total income of that individual from all sources for the previous year, estimated in the same manner as the total income from all sources is estimated for the purposes of exemptions or abatements under the Income Tax Acts; but, in estimating the income of the previous year for the purpose of super-tax:—

. . . . . .

"(*d*) Any income which is chargeable with income tax by way of deduction shall be deemed to be income of the year in which it is receivable, and any deductions allowable on account of any annual sums paid out of the property or profits of the individual shall be allowed as deductions in respect of the year in which they are payable, notwithstanding that the income or the annual sums as the case may be, accrued in whole or in part before that year."

Sect. 72: "(1.) The super-tax shall be assessed and charged by the commissioners for the special purposes of the Acts relating to income tax (in this Act referred to as the Special Commissioners).

. . . . . .

"(6.) All provisions of the Income Tax Acts relating to persons who are to be chargeable with duty, assessments, and appeals against those assessments, and to the collection and recovery of duty, and to cases to be stated for the opinion of the High Court shall, so far as they are applicable, apply to the charge, assessment, collection, and recovery of duty under this section, and the special commissioners shall, for the purpose of assessment, have any powers of an inspector or surveyor of taxes . . . . ."

J. R.

JOHNSON BROTHERS AND COMPANY APPELLANTS *v.* COMMISSIONERS OF INLAND REVENUE, RESPONDENTS. 1919 *July* 24.

Revenue—Excess Profits Duty—Deductions—Employees remunerated by Share of Profits—Special Commissioners increasing Assessment on Appeal—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 40, 45, *Sched. IV., s.* 5.

Before the year 1910 the owner of the appellants' business had in his employment his three sons, each of whom was paid a salary of 150*l.* In 1910 an agreement was entered into by the father with his sons whereby each of the latter received 25 per cent. of the net profits; but the sons were not taken into partnership, and they continued to hold subordinate positions in the business. From 1912 the profits greatly increased, and large sums were paid to the sons. In assessing the profits of the business to excess profits duty the Inland Revenue Commissioners disallowed as a deduction the difference between the sums paid to the sons in the last pre-war year and those paid to them in each of the three accounting years 1914–1916. On appeal to the Special Commissioners, 250*l.* of the amount paid to each son was held to be the full amount which was wholly and exclusively laid out or expended for the purposes of the trade or business, the balance being disallowed as a deduction. The effect of this was to increase the amount of the assessable profits. On appeal:—

Held, dismissing the appeal, (1.) that the Special Commissioners had jurisdiction to increase the assessment; and (2.) that they were entitled to say what amount of the share of the profits paid to the sons should be allowed to be deducted as their remuneration for the time and labour expended by them in the business.

CASE stated by Commissioners for Special Purposes of the Income Tax Acts.

The appellants appealed against certain assessments and additional assessments to excess profits duty made by the Inland Revenue Commissioners in respect of the years 1914, 1915 and 1916.

The business carried on by the appellants belonged to one David Johnson. Before 1910 he had in his employment his three sons, each of whom was paid a salary of about 150*l.*; but in the year mentioned agreements were entered into by the father with the sons, whereby each of the latter received a sum equivalent to 25 per cent. of the net profits. These agreements were for a period of three years, but they were afterwards tacitly renewed. The sons were not taken into

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partnership, and they continued to hold subordinate positions in the business. Under the new arrangement the sons received for the first year little more than the amount of their previous salaries; in the second year they received less; but in the following years they received considerably more. In 1913, the pre-war year, each received 737*l.*, making a total for the three of 2211*l*; in 1914 each received 1266*l.*, or a total of 3798*l.*; in 1915 each received 1321*l.*, or a total of 3963*l.*; and in 1916 each received 1804*l.*, or a total of 5412*l.*

For the years 1914 and 1915 the Inland Revenue Commissioners made assessments allowing the full sums payable to the sons as a deduction, but thereafter they made additional assessments for those years in which the difference between the sums paid to the sons in the last pre-war year—i.e., 2211*l.* for the three—and the sums paid to them in the respective accounting periods was disallowed, and a similar course was adopted in making the assessment for the year 1916.

The father said in giving evidence before the Special Commissioners that the sons were good workmen and might each be worth commercially more than 250*l.* per annum though certainly not so much as the 1804*l.* received by each for the year 1916; the balance, he said, might be considered as paid on account of family feeling.

Before the Special Commissioners the appellants objected that the Inland Revenue Commissioners, having made an assessment for the years 1914 and 1915 with full knowledge of the facts, had no jurisdiction to make additional assessments for those years. This objection the Special Commissioners overruled. The appellants then contended that the sums paid to the sons in each of the three years were properly deducted in arriving at the amount on which excess profits duty was payable as the transaction under which they received those sums was not "artificial," but was a bona fide arrangement.

The respondents contended, inter alia, that the sons' remuneration was not "money wholly and exclusively laid out or expended for the purposes of the trade or business" within the first rule, 1st and 2nd cases, Sched. D, s. 100, of

the Income Tax Act, 1842 (which, by s. 40, sub-s. 1, of the Finance (No. 2) Act, 1915, is made applicable to the computation of profits for the purposes of excess profits duty); that a share of the profits of the business could not be deducted in arriving at the profits; that the transaction or operation under which the sons received their payments fell within the latter part of rule 5, Part I. of Sched. IV. of the Act of 1915; and that either the whole of the sums received by the sons or so much thereof as exceeded an adequate remuneration for their services, say 250*l.* each, should be disallowed, and the assessment should be increased accordingly.

The Special Commissioners found that the sons were not partners, and were not concerned in the management of the trade or business; that the sum charged as an expense in each year as remuneration to each of the three sons was not in its entirety a sum wholly and exclusively laid out or expended for the purposes of the business; that 250*l.* of the amount paid to each son (or 750*l.* in the aggregate) was the full amount which was wholly and exclusively laid out or expended for the purposes of the trade or business; and they increased the assessment accordingly.

Hon. W. Finlay K.C. and *Bremner* for the appellants. The Special Commissioners had no jurisdiction to increase the assessment. They purported to act under s. 6 of the regulations, dated January 6, 1916, made by the Inland Revenue Commissioners with respect to the assessment and collection of excess profits duty; but that regulation only deals with the Special Commissioners' powers as to "the hearing of an appeal." It is said that the regulation reads in s. 57, sub-s. 8, of the Taxes Management Act, 1880, which enables the Commissioners, in dealing with income tax appeals, to increase assessments "to the amount of the sum omitted." But that section does not apply to an appeal against an assessment to excess profits duty, for by s. 45, sub-s. 1, of the Finance (No. 2) Act, 1915, "the excess profits duty shall be assessed by the Commissioners of Inland Revenue."

On the merits, the Special Commissioners were wrong

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in refusing to allow as a deduction the whole of the sums paid to the sons. By s. 44, sub-s. 3, of the Act of 1915, "a person shall not, for the purpose of avoiding the payment of excess profits duty, enter into any fictitious or artificial transaction or carry out any fictitious or artificial operation," and by s. 5 of part I. of Sched. IV. of the Act, "no deduction shall be allowed in respect of any transaction or operation of any nature, where it appears, or to the extent to which it appears, that the transaction or operation has artificially reduced the amount to be taken as the amount of the profits of the trade or business for the purposes of this Act." In this case it cannot be said that the arrangement under which the sons were paid a share of the profits was artificial or fictitious, or that the payments had caused an artificial reduction of the profits, seeing that the agreements with the sons were entered into bona fide before there was any idea of the imposition of an excess profits duty. Nor can it be said that the payments were not wholly and exclusively laid out or expended for the purposes of the trade or business. The Commissioners are not entitled to say that the father need not have paid these sums to his sons; he doubtless considered that the sons having for some years had only a small salary, should now have larger salaries based on the success of the business. The moment it is seen that the sums were paid under a bona fide agreement for the sons' remuneration they must be treated as salaries which were wholly and exclusively laid out or expended for the purposes of the business.

T. H. Parr (*Sir Gordon Hewart, A.-G.* and *R. P. Hills* with him) for the respondents.

[ROWLATT J. I do not desire to hear you on the point as to the Special Commissioners' power to increase the assessment.]

For the purposes of excess profits duty the profits must be determined by allowing as a deduction only those sums which can truly be said to have been spent in earning the profits. In this case the sums paid to the sons were not truly expended in earning the profits of the business. It is found that two elements enter into the payments to the sons, first, a payment for services rendered, and secondly, a payment on sentimental

grounds. So much as represents the latter element must, for this purpose, be eliminated, and the Special Commissioners are the persons to do that. They have done it, and there was certainly evidence before them entitling them to split up the amounts and say how much should be allowed as the true remuneration for the services actually performed by the sons.

Hon. W. Finlay K.C. in reply. The fact that sentiment may to some extent have influenced the payments is immaterial; it is enough if the payments were made under a bona fide arrangement, and undoubtedly they were.

ROWLATT J. This case, which is somewhat remarkable in its facts, has caused me a little trouble, but when the position is really appreciated I think the difficulty disappears. The business in question has shown a marked increase in profits during the past few years, the receipts having doubled in the year before the war and having increased since then very considerably. Before 1910 the three sons were employed by their father at salaries, but in that year an agreement was made whereby, instead of paying them salaries, he gave them a share of the profits; he did not, however, make them partners. The agreement, which was perfectly bona fide—for in 1910 there was no thought of the imposition of an excess profits duty—expired in 1913 but was tacitly renewed. By this arrangement the father put the sons in a position which was not that of wage earners at all; he gave them a share of the profits because they were working in the business. In assessing the profits of the business in these circumstances some allowance must be made for the time and labour expended by the sons who receive nothing expressly for these, the share of the profits being a sufficient inducement to them to do the work. That is how the position must be analysed, and looking at it in this way the decision of the Commissioners was right. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitors for appellants: *Abbott & Hudson.*

Solicitor for respondents: *Solicitor of Inland Revenue.*

J. S. H.

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[IN THE COURT OF APPEAL.]

STEVEN AND ANOTHER *v.* BROMLEY & SON.

[1916 S. 842.]

Ship—Charterparty—Contract to load particular Cargo—Loading of different Cargo—Higher Freight—Breach of Contract—Damages—Implied Contract for higher Freight—Quantum meruit.

Charterers of a ship agreed to load her with a full cargo of steel billets at a specified rate of freight. A cargo was loaded consisting in part of general merchandise, the current rate of freight for which was higher than the specified rate. In an action by the shipowners against the charterers for breach of the charterparty in not loading according to its terms, the charterers contended that the shipowners were only entitled to nominal damages beyond the amount of the chartered freight:—

Held, that the shipowners were not restricted to nominal damages, but that the facts implied an offer by the charterers to load general merchandise at the current rate of freight and an acceptance by the shipowners of that offer.

Held, therefore, that the shipowners were entitled to freight at the current rate in respect of the general merchandise loaded.

Judgment of Bailhache J. affirmed.

APPEAL from the judgment of Bailhache J. in an action tried before the learned judge without a jury.

The plaintiffs were the charterers under a time charterparty of the steamship *Strathcona*. They entered into a charterparty with the defendants which was dated November 19, 1915, and contained the following provisions: It was mutually agreed between the plaintiffs, time chartered owners of the ship, and the defendants that the ship should proceed to Manchester or Liverpool or Birkenhead at the option of the defendants, the charterers, and there load in the customary manner from the factors of the said affreighters a full and complete cargo of steel billets . . . . and being so loaded should proceed therewith to Nantes and deliver the same as and where ordered by the consignees on being paid freight at the rate of 23*s*. per ton of 20 cwts. on cargo loaded as per bill of lading. The freight was to be paid in Liverpool on production of true note of delivery of cargo. The ship was to be addressed to the defendants' agents at the ports of loading and discharge.

The defendants had already agreed to charter to third persons a vessel for a cargo of general merchandise from Liverpool or Birkenhead to Nantes at a rate of freight higher than that specified in the plaintiffs' charterparty of November 19, 1915. In pursuance of this contract the defendants offered the *Strathcona* to these third persons, who loaded her with a full cargo consisting of some 1208 tons only of steel billets and 987 tons of general merchandise. The plaintiffs were not aware that a general cargo was being loaded. The master knew, but made no objection. For the cargo other than steel billets the defendants were receiving an average freight of about 30*s.* per ton.

The plaintiffs claimed that they were entitled to freight at the current rate upon 987 tons of general merchandise, either as damages for breach of the charterparty or upon a quantum meruit for loading and carrying cargo outside the charterparty. The defendants contended that the plaintiffs' only claim was for breach of the charterparty in loading goods other than steel billets; they asserted that they had paid the plaintiffs 2524*l.*, and that if a full cargo of steel billets had been loaded the plaintiffs would have received 2540*l.* 10*s.* They admitted liability for 16*l.* 10*s.* 1*d.*, but denied that the plaintiffs were further damnified.

Bailhache J. assessed the freight on the general merchandise at 30*s.* a ton, and gave judgment for the plaintiffs on that basis.

The defendants appealed.

R. A. Wright K.C. and *Cuthbertson* for the appellants. The plaintiffs have suffered no substantial damage. The measure of damages for breach of contract by the charterer to load a particular cargo is the difference between what the shipowner actually receives and what he would have received as freight if the cargo contracted for had been loaded: *Capper* v. *Forster* (1); Carver on Carriage by Sea, s. 263, 6th ed. (1918), p. 365. If a full cargo of steel billets had been loaded the plaintiffs would have been no better off. Their damages therefore are merely nominal.

(1) (1837) 3 Bing. N. C. 938.

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[ATKIN L.J. If I let you the use of my ship to carry a harmless cargo, and you use her to carry a dangerous cargo, can you tender me nominal damages if she escapes injury ?]

It is hard to see what other damage has been suffered.

[BANKES L.J. Would not that imply a new contract to pay a reasonable freight for the dangerous cargo ?

ATKIN L.J. How if I let you the use of my ship for one voyage and you take her on another ?]

Unless a new contract is to be implied the damages are nominal if no loss has befallen the shipowner. No new contract can be implied here: *The Olanda.* (1) There the cargo to be shipped under a charterparty consisted of linseed and wheat of which not more than one-half was to be linseed. Much more than this quantity of linseed was shipped. The shipowners claimed to be paid a quantum meruit on the excess, but it was held in the House of Lords that they were only entitled to nominal damages.

Leck K.C. and *Jowitt* for the respondents were not called on.

BANKES L.J. This is an appeal from Bailhache J. which arises thus: On November 15 a charterparty was entered into between the appellants, who were therein described as time chartered owners of the steamship, and the respondents as charterers, under which the charterers agreed to load the ship at Liverpool or Birkenhead at their option with a full and complete cargo of steel billets at the rate of 23*s.* a ton on cargo loaded as per bill of lading. The ship proceeded to Liverpool, and the charterers tendered 1208 tons of steel billets, which were loaded. But apparently they had no more of this cargo, or did not wish to load more, and they completed the cargo by adding 987 tons of general merchandise. The current rate of freight for general merchandise was much higher than the chartered freight for steel billets. The learned judge has assessed it at 30*s.* a ton. This action was brought to recover, amongst other things, the difference between the chartered rate for 987 tons of steel billets and the current

(1) (1917) Unreported. See note on p. 728, post.

rate for 987 tons of general merchandise. The claim is based either upon a breach of the charterparty or upon an implied agreement to pay a reasonable rate of freight for the 987 tons of general merchandise.

I agree with the contention that if this were an action for a mere breach of the charterparty the measure of damages would be the difference between the amount actually received by the shipowners and the amount they would have received for a full cargo of steel billets, and the damages would be merely nominal. But the plaintiffs are not confined to a claim for damages for breach of the charterparty. They can contend that the facts point to a fresh contract between the parties, or a fresh term added to the original contract, by which the charterers came under an obligation to pay the current rate of freight in respect of general merchandise shipped in the place of steel billets. That is what Bailhache J. has found, and that inference is justified by the facts of this case. Where, as here, a charterer tenders for shipment cargo which is not that contracted for but is a different cargo for which the current rate of freight is substantially higher than the agreed rate for the cargo under the charter, the inference may be drawn that the charterer has requested the shipowner to carry a substituted cargo on the terms that he will pay the current rate of freight for cargo of that description. It is true that the new contract does not take the form of an offer made in writing by the charterer and accepted in writing by the shipowner, but it may be inferred from the tender of a cargo by the charterer to the captain, a man who to the knowledge of the charterer is not in a position to vary the original contract. This is a continuing offer which the owner may accept as soon as the act of the charterer comes to his knowledge. In these circumstances there was such an offer made by the charterers and accepted by the owners, and on that substituted contract so made the claim of the owners is well founded for the difference between the contract freight for the cargo which ought to have been loaded under the charter and the current freight for the general merchandise which was loaded in its place.

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Bankes L.J.

It was said that this case was covered by *The Olanda* (1); but I do not think it is. The decision in *The Olanda* (1) turned upon the special and peculiar facts of that case which were these: There was a charterparty under which the charterer agreed to ship grain at a certain rate of freight and linseed at another and higher rate. The amount of linseed to be shipped was not to exceed one-half of the whole cargo. More than that proportion was shipped. The question was whether as to this excess the charterers should pay at the contract rate, or whether there was an implied contract that they should pay at the current rate of freight for the carriage of linseed. The House of Lords affirming the Court of Appeal on an appeal from Bailhache J., who had dealt with the matter on the finding of an arbitrator, came to the conclusion that the excess of linseed was shipped under a misapprehension on the part of both the shippers and the captain of the ship as to the amount of linseed that might be shipped under the charterparty, and that both parties intended that the linseed in question should be carried under the charterparty and at the chartered rate. In these special circumstances it was held that there was no room for implying a fresh contract to pay at the current rate. The present case is very different. This charterparty contained no contract rate for general merchandise. A general cargo was outside the contemplation of the parties. The cargo was to consist of steel billets and of nothing else. When the charterers tendered a cargo which was outside the charterparty, and for which no rate of freight had been agreed, the inference is justified that they made an offer to the owners to pay a reasonable freight if the cargo was accepted for carriage. The judgment of Bailhache J. was right, and the appeal must be dismissed.

SCRUTTON L.J. I am of the same opinion. The shipowners claim freight on a quantity of cargo, or alternatively a like sum as damages for the breach of a charterparty whereby their ship was to carry a cargo of steel billets at a specified

(1) See note on p. 728, post.

freight. Nearly half the cargo shipped was general merchandise commanding a rate of freight much higher than the chartered rate. What is the legal result of this? It is a commonplace of the law that there can be no implied contract as to matters covered by an express contract until the express contract is displaced. A well-known example of this is where an agent works on the terms that he shall receive a commission if successful. That excludes a claim on a quantum meruit for work which does not result in success. But where work is done outside the contract, and the benefit of the work is taken, a contract may be implied to pay for the work so done at the current rate of remuneration, and the terms of the express contract may remain binding in so far as they are not inconsistent with the implied contract. Here the charterers tendered cargo which was not within the charterparty. They tendered it to one who had no authority to vary the terms of the charterparty. Thereupon this cargo was carried. The proper legal inference is a promise by the charterers to pay reasonable remuneration for carriage of the cargo outside the charterparty, and for the rest of the work done to pay according to the terms of the charterparty so far as applicable.

If the House of Lords had decided otherwise I should be bound to follow that decision. But *The Olanda* (1) turned on very special facts. The charterparty provided for a cargo of wheat and linseed. Only wheat and linseed were shipped. Only 50 per cent. of the cargo was to be linseed, but by mistake more than 50 per cent. was shipped. The shipowners claimed payment for the excess at the current rate outside the charterparty. The House of Lords drew from the facts the inference that the excess had been tendered and accepted as cargo under the charterparty. That decision has no application to the facts of the present case. If the whole of the cargo loaded by the charterers had been general merchandise there must have been an implied contract to pay at the current rate of remuneration for the cargo carried. The same inference is to be drawn where half the cargo was outside the charterparty. I agree that the appeal should be dismissed.

(1) See note on p. 728, post.

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ATKIN L.J. I agree. The fact which distinguishes this case from *The Olanda* (1) is that, in the words of Bailhache J., "it is not and could not be pretended that in loading general merchandise the charterers thought that they were within their contractual rights. They knew that they were not. They did not load under the charterparty, and as they did not and knew that they did not" the charterparty rate for steel did not apply. The position in law seems to me to be this: An offer of this cargo by the charterers to the shipowners with a request that they will carry for a reasonable remuneration so much as is not within the charterparty and the remainder on the terms of the charterparty so far as applicable. The owners were at liberty to accept that offer and to sue for reasonable remuneration for carrying the cargo other than the steel billets. The principle of this case is not distinguishable from a well-settled principle of the law as to the sale of goods. If I order from a wine merchant twelve bottles of whiskey at so much a bottle and he sends me ten bottles of whiskey and two of brandy and I accept them, I must pay a reasonable price for the brandy. That is the position here. For the reasons given by the other members of the Court I agree that the appeal should be dismissed.

I should like to reserve the question of the measure of damages for a breach of contract involving a misuse of the plaintiff's goods. If the owner of goods lets them to another on the understanding that they will be used for purposes which are free from danger and the other uses them for purposes involving danger and detention, I should like to consider whether the damages for this breach of contract might not include reasonable remuneration for use of the plaintiff's goods in dangerous work.

Appeal dismissed.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Ince, Colt, Ince & Roscoe.*

(1) See note below.

NOTE.—*The Olanda* sub. nom. *Stoomvaart Maatschappij Nederlandsche Lloyd* v. *General Mercantile Company, Limited*, House of Lords, January 29,

1917. The reporter has been furnished with the following note of the speeches of the noble and learned Lords in this appeal.

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LORD FINLAY L.C. My Lords, a charterparty was entered into in this case, which provided that the steamer *Olanda* should proceed to a port on the river Parana and there receive a full and complete cargo of wheat, maize, rye, or linseed or rape seed. The wheat, maize and rye were to be paid for at 32*s.* per ton for carriage to Europe, and the linseed or rape seed was to be paid for at the rate of 1*s.* per ton more than the rate for wheat, maize or rye; and there was added a stipulation that there should not be more than 50 per cent. of linseed. A quantity considerably in excess of 50 per cent. of linseed was in fact put on board the steamer, and the action is brought to recover at the current rate of freight for the carriage of linseed at the time when that linseed was carried.

My Lords, it has been found by the arbitrator that the damages were nominal, and the same view was taken by Bailhache J. and by the Court of Appeal. It is now contended that the shipowners are entitled to a larger sum, and the case is put in two ways. First, it is said that the rate for the carriage of linseed had considerably risen, and that therefore the shipowners are entitled to the current rate of freight at the time the linseed was carried. Secondly, it is said that they lost the space in the vessel which was occupied by the linseed which could not properly have been put on board under the charterparty, and that they are entitled to damages for the loss of the use to which they might have put that space.

My Lords, cases were cited in support of the first claim to show that where there are alternative remedies the person aggrieved may waive one of them and pursue the other. As to that there is no doubt whatever; but in order to bring that doctrine into play you must have a case where alternative remedies exist. It is said that in the present case, instead of suing for breach of contract, the shipowners had the right to proceed for recovery of the current rate of freight under the doctrine of quantum meruit. My Lords, if the circumstances gave rise to a contract to pay at the current rate of freight, in other words as upon a quantum meruit then, of course, that deduction might be made; but in my judgment the circumstances do not give rise to any such right.

Both parties intended that this linseed should be carried under the charterparty, and the charterparty provides that linseed should be carried at the rate of 33*s.* per ton. It would be entirely different if the owners of the ship, through their agents abroad, had protested against the putting of the linseed on board and had received the linseed under protest; but here by consent of both parties the linseed was taken as under the charter and at the chartered rate of freight. There are no circumstances of wrongful misrepresentation such as to give rise to a right of action in respect of the shipowners being misled; but all that we have got is that the linseed was carried owing to a mistake both parties shared, as to the right to have more than 50 per cent. of linseed carried on board the vessel. That seems to me to dispose of the claim to be paid at the current rate of freight at the time the linseed was carried.

My Lords, as regards the lost space, it appears to me that the answer is substantially this. The space was occupied by consent of both parties because both parties were under a misapprehension, induced by an innocent misrepresentation made by the charterers.

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Under these circumstances, my Lords, it seems to me that it would be impossible to reverse the decision of the Court of Appeal confirming that of Bailhache J. Everything possible has been said in support of the appeal, but it appears to me to be a case in which no other conclusion can be arrived at than that at which the arbitrator and both Courts below have arrived.

LORD DUNEDIN. My Lords, I concur. The appellants here have argued their case on alternatives; they say they are entitled in the sum of money they ask for either on quantum meruit or as damages.

As regards quantum meruit where there are two parties who are under contract quantum meruit must be a new contract, and in order to have a new contract you must get rid of the old contract. The contract here was not a contract for each parcel of the different grain, it was a contract of affreightment of the whole ship. The freight was to be paid on a scale according to what the grain was, and then there was a stipulation concurrently with that that not more than a certain amount of linseed should be carried. The whole contract here has certainly not been got rid of, because the appellants admit that the freight has been quite properly paid under the contract upon the wheat or maize that was shipped. Accordingly I do not think that here there is any room for the doctrine of quantum meruit, and I entirely agree with what the noble and learned Lord on the Woolsack has said about the way in which this grain was shipped by mutual action of both parties.

Then, as regards damages, no doubt a stipulation of the contract has been broken and damages are due. It might have been that the appellants were in a position actually to prove damages if they could have shown, for instance, that the effect of the 1200 tons extra of linseed was in some way or other to damage the ship. Then they could no doubt have recovered damages. There is nothing of that sort. All they say is that they are entitled to a computation on the increased freight that was being earned elsewhere at the time of loading; but all they can ask in damages is that they should be put in the same position as if the contract had been duly carried out, and if the contract had been duly carried out by putting wheat instead of this 1200 tons of linseed they would have got 60*l.* less than they have got.

I think the judgment of the Court of Appeal should be affirmed and the appeal dismissed.

LORD ATKINSON. My Lords, I concur. I think the judgment of the Court of Appeal was absolutely right, and I have nothing to add.

LORD PARKER OF WADDINGTON. My Lords, I agree.

LORD SUMNER. My Lords, I concur.

LORD WRENBURY. My Lords, I agree.

Appeal dismissed.

Leck K.C. and *Raeburn* for the appellants.
Maurice Hill K.C. and *R. A. Wright* for the respondents.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Thomas Cooper & Co.*

W. H. G.

WILLIAM ESPLEN, SON AND SWAINSTON, LIMITED, Appellants; *v.* COMMISSIONERS OF INLAND REVENUE, Respondents.

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Revenue—Excess Profits Duty—Exemption—Profession—Company doing Naval Architect's Work—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *ss.* 38, 39.

Sect. 39 exempts from the payment of excess profits duty "any profession the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount":—

Held, that an incorporated company cannot claim the benefit of this exemption, notwithstanding that its members are all professional men, and that the character of the work it does is the same as that done by a person carrying on a profession.

CASE stated by commissioners for the special purposes of the Income Tax Acts.

The appellants appealed against assessments to excess profits duty made upon them for the two years ending respectively on December 31, 1915, and December 31, 1916. There was no dispute as to the figures, the sole ground of appeal being that the appellants claimed to come within the exemption from excess profits duty accorded by s. 39 of the Finance (No. 2) Act, 1915 (1), to those carrying on a profession.

The appellants were incorporated under the Companies Acts in 1911 and carried on business as naval architects and consulting engineers. Before the formation of the company, a partnership had existed for many years consisting of John

(1) Sect. 38 of the Finance (No. 2) Act, 1915, imposes an excess profits duty on certain profits arising from any trade or business.

Sect. 39: "The trades and businesses to which this part of this Act applies are all trades or businesses . . . of any description carried on in the United Kingdom, or owned or carried on in any other place by persons ordinarily resident in the United Kingdom, excepting—

(*a*) Husbandry in the United Kingdom; and
(*b*) Offices or employments; and
(*c*) Any profession, the profits of which are dependent mainly on the personal qualifications of the person by whom the profession is carried on and in which no capital expenditure is required, or only capital expenditure of a comparatively small amount. . . ."

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Esplen, W. H. Swainston and J. J. Esplen who, on incorporation, became the sole shareholders and directors of the company. The partnership carried on the profession of naval architects and consulting engineers, and the work done by the company was identical in character with that formerly done by the partnership which it succeeded. The three gentlemen above-mentioned, who became the sole shareholders and directors of the appellant company, were all members of the Institute of Naval Architects, admission to which is granted by reference to the standing and experience of an applicant, and is an undoubted test of a member's practical efficiency. The work done by the appellants was identical in all respects with the work of a professional naval architect and consulting engineer, and was performed by the said John Esplen, W. H. Swainston and J. J. Esplen personally.

The Commissioners held that the appellants were carrying on a trade or business and that the exception in para. (*c*) of s. 39 of the Finance (No. 2) Act, 1915, did not apply to a company; they accordingly confirmed the assessments.

A. M. Latter for the appellants. It is clear that a naval architect exercises a profession, and the question is whether, when three naval architects cease to form a partnership and become incorporated under the Companies Acts, they are thereby deprived of the benefit of the exemption given to professions by s. 39, para. (*c*), of the Finance (No. 2) Act, 1915. In considering para. (*c*), the general character of the profession is to be looked at. See *Inland Revenue Commissioners* v. *North and Ingram*. (1) The paragraph refers to a genus and not necessarily to an individual.

[ROWLATT J. It may be said that the company as such is not carrying on a profession.]

A company never does anything of itself; it has to employ persons. A company can carry on husbandry within the section although it has to employ labourers to till the ground and do the other necessary work: *Inland Revenue Commissioners* v. *Ransom & Son*. (2) Further, in this case the

(1) [1918] 2 K. B. 705. (2) [1918] 2 K. B. 709.

company is identical with the persons who actually carry on the profession. The persons composing the corporation can be looked at: *New York Life Insurance Co.* v. *Styles.* (1) The fees paid to the company by customers were for the services of naval architects; they were not paid to the company merely that it should find a naval architect to do the work. Even, however, if it can be said that the fees were paid for both those purposes, the profits arising therefrom can be severed: *Inland Revenue Commissioners* v. *Maxse.* (2) The greater portion of the profits was undoubtedly earned by the performance of naval architects' work, and is therefore exempt from excess profits duty.

Sir Ernest Pollock S.-G. (*T. H. Parr* and *R. P. Hills* with him) for the respondents. The three gentlemen composing the appellant company were, before their incorporation, exercising a profession, but they chose to incorporate themselves and they must accept the consequences of so doing, whether these are advantageous or disadvantageous to them. If work which the company is commissioned to do is done negligently, the company is liable, not the individual members. Claims by creditors would also be against the company only. The fact that the three gentlemen are incorporated cannot be disregarded. The argument for the appellants involves treating the members as independent of the company. That cannot be done. It is the company which makes the profits, and it is impossible to say that it is a "person by whom the profession is carried on." *New York Life Insurance Co.* v. *Styles* (1) has no application. That was the case of a company incorporated in New York, the business carried on being for the mutual profit of the members; there were no shares or shareholders; and the company had no relations with outside bodies. There is no analogy between the position of the company in that case and that of the appellant company. *Inland Revenue Commissioners* v. *Ransom & Son* (3) was decided upon a different limb of the section and has no bearing on this case.

Latter replied.

(1) (1889) 14 App. Cas. 381. (2) [1919] 1 K. B. 647.
(3) [1918] 2 K. B. 709.

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WILLIAM ESPLEN, SON AND SWAINSTON, LD. v. INLAND REVENUE COMMISSIONERS.

ROWLATT J. In this case it is quite clear that the concern which is carried on is carried on by the company, and the question is whether the company is carrying on a profession within the meaning of s. 39, para. (*c*) of the Finance (No. 2) Act, 1915. It is said that it carries on a profession because the business it does is that of naval architects and because the members composing it are three naval architects. In a sense it is true that the company does the work of a naval architect, and for the work done the company alone would be responsible, and claims by creditors would be against the company. It is agreed that a naval architect is a professional man, and it is true, as Mr. Latter contended, that what has to be looked at is the character of the work generally, but in my opinion the company is not carrying on the profession of naval architects within the meaning of the section, because for this purpose it is of the essence of a profession that the profits should be dependent mainly upon the personal qualifications of the person by whom it is carried on, and that can only be an individual. There can be no professional qualifications except in an individual. A company such as this can only do a naval architect's work by sending a naval architect to its customers to do what they want done. As I think the company is not carrying on a profession the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellants : *Downing, Handcock, Middleton & Lewis.*

Solicitor for respondents : *Solicitor of Inland Revenue.*

J. S. H.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1919 *May* 12.

C. A. *June* 27, 30; *July* 31.

In *re* THELLUSSON.

Ex parte ABDY.

Bankruptcy—Money lent to Debtor—Receiving Order—Ignorance of Debtor and Lender—Right of Trustee in Bankruptcy to retain Money.

In October, 1918, a bankruptcy notice was served on the debtor and on January 2, 1919, a receiving order was, without his knowledge, made against him. On the following day the applicant, who was also ignorant of the receiving order having been made, or that the debtor had committed an act of bankruptcy and a bankruptcy petition had been presented against him, lent the debtor a sum of money. At the time the loan was made, the debtor knew that the petition had been set down and that the hearing had been fixed for the preceding day. He had consulted his solicitors, but, as he did not provide them with sufficient funds, they did not appear at the hearing of the petition. On an application by the applicant that the loan transaction might be declared void and the Official Receiver, as the trustee of the property of the debtor, ordered to repay to the applicant the balance of the loan remaining in his hands :—

Held, that the Court in Bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court, where insistence would produce an unjust and dishonest result.

Held, therefore, that inasmuch as if the debtor had known on January 3 of the receiving order it would have been dishonourable of him to receive the money, the trustee ought to be directed to refund it.

Principle laid down in *Ex parte James* (1874) L. R. 9 Ch. 609, *Ex parte Simmonds* (1885) 16 Q. B. D. 308, and *In re Tyler* [1907] 1 K. B. 865 applied.

Tapster v. *Ward* (1909) 101 L. T. 25, 503 and *In re Stokes* [1919] W. N. 110; since reported [1919] 2 K. B. 256 distinguished.

Observations of Farwell L.J. in *In re Hall* [1907] 1 K. B. 875 commented on and explained.

Decision of Horridge J. reversed.

Motion on behalf of the applicant H. E. Abdy, a creditor, for an order that a loan transaction entered into between the applicant and the debtor Thellusson on January 3, 1919, be declared void and/or rescinded, and that the Official Receiver, as the trustee of the property of the debtor, do repay to the applicant the sum of 764*l.* 0*s.* 5*d.* now in his hands, being part of a sum of 900*l.* paid into the debtor's banking account

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by the applicant in respect of the loan transaction on January 3, 1919.

The applicant was a lieutenant in the 15th Hussars, and he became acquainted with the debtor, a retired naval officer, in October, 1918. In that month a bankruptcy notice was served on the debtor. In November, 1918, the debtor asked the applicant to advance to him on loan a sum of 1000*l.* to pay a pressing creditor. On December 9, 1918, the applicant advanced 100*l.* to the debtor, and on January 3, 1919, he paid the balance of 900*l.* into the debtor's banking account, and on the same day the debtor executed a deed by which he covenanted to repay the loan, together with an additional sum for certain costs and expenses, incurred by the applicant, and interest on the total amount (1272*l.*) in the meantime. On January 2, 1919, a receiving order was made against the debtor. When the advance of 900*l.* was made on January 3, 1919, the applicant did not know that the debtor had committed an act of bankruptcy or that a bankruptcy petition had been filed against him, and neither the applicant nor the debtor knew that the receiving order had been made, but the debtor knew that the bankruptcy petition against him had been set down and that the hearing was to take place on January 2, 1919. He had consulted his solicitors, but as he did not provide them with sufficient funds they did not appear at the hearing of the petition. On February 7, 1919, the debtor was adjudicated a bankrupt. There was now in the hands of the Official Receiver the sum of 764*l.* 0*s.* 5*d.*, the subject of the motion, being part of the 900*l.* so advanced by the applicant. In an affidavit made by him the applicant said that the fact that the receiving order had been made was a fact which it was material for him and for his solicitor to know before agreeing to make the advance of 900*l.*, and that neither he nor his solicitor would have made the advance if the fact that the receiving order had been made had been disclosed to either of them. The applicant further said that the transaction was entered into under a mistake of fact common to both parties, and that he was induced to make the advance by the innocent concealment by the debtor of the fact that a receiving order

had been made. On learning the true facts the applicant's solicitor tendered a proof in the bankruptcy for the amount covenanted to be repaid, but the proof was rejected except so far as it related to the 100*l.* which had been advanced by the applicant before the date of the receiving order.

C. M. Pitman for the applicant.

E. W. Hansell for the Official Receiver.

HORRIDGE J. [having stated the facts] continued: On behalf of the applicant it is contended that, as when the 900*l.* was paid neither he nor the bankrupt knew that the receiving order had been made there was a common mistake which entitles the applicant to have the deed set aside and to repayment of so much of the 900*l.* as was received by the trustee in bankruptcy. It seems to me that the present case is clearly not within that class of cases of which *Taylor* v. *Caldwell* (1) is an example, where Blackburn J. said: "And there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." *Taylor* v. *Caldwell* (1) was followed by a number of authorities, amongst them *Tamplin Steamship Co.* v. *Anglo-Mexican Petroleum Products Co.* (2) The principle upon which those decisions are based seems to me not to apply to the present case because nothing has happened to render the performance of this contract impossible or indeed to interfere with it. The

(1) (1863) 3 B. & S. 826, 833. (2) [1916] 2 A. C. 397.

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bankrupt was in a position to make the contract although a receiving order had been made against him; and he could render himself liable to pay back the money and interest. It may be quite true the applicant could not prove in this particular bankruptcy in respect of the debt of 900*l.*, but he can if he chooses present another petition founded on the debt which is not provable in this bankruptcy.

It was further contended on behalf of the applicant that the money is recoverable by him as a payment made under a mistake of fact. In Smith's Leading Cases, vol. ii., 12th ed., p. 425, in the note to *Marriot* v. *Hampton* (1), it is said that "The mistake of fact, to be sufficient to enable a person who has paid money to recover it back, must be, it seems, a mistake as to a fact, which, if true, would have rendered him liable to pay the money, . . ." The mistake as to fact in the present case could not have affected the liability to pay the money, or the rights acquired by either of the parties under the contract. The note in Smith's Leading Cases continues: "and not merely as to a fact which, if true, would have rendered it desirable that he should pay it (see per Bramwell B., *Aiken* v. *Short*. (2)" In my view the present case falls exactly within the second portion of the proposition. It is not desirable to contract with a person against whom a receiving order had been made, and it may be it was not desirable for a person against whom a receiving order had been made to contract; but the mistake as to the receiving order having been made did not affect the contract in the least or the rights of the contracting parties. There was not a mistake of fact as to anything which affected the subject-matter of the contract. Therefore, it seems to me, there is no ground for holding that the money was paid under a mistake of fact.

The last contention on behalf of the applicant, which I think was a rather desperate one, was that the present case came within the principle of *Ex parte James* (3), where the Court of Appeal held that the principle that money paid under a mistake of law is irrecoverable must not be stretched so as to

(1) (1797) 7 T. R. 269. (2) (1856) 1 H. & N. 210, 215.
(3) L. R. 9 Ch. 609.

cover a case where a trustee had been paid money by a sheriff to which he had no right. In the present case, in my opinion, there is no principle on which this contract could be set aside. There is no reason why there should be any equity affecting the trustee arising out of the transaction. The trustee is merely doing his duty in saying "I cannot repay money which I am entitled to retain as the property of the bankrupt."

In these circumstances the motion must be dismissed with costs.

J. E. A.

The applicant appealed.

Kerly K.C. and *C. M. Pitman* for the appellant. First, it is submitted that this money was paid subject to a trust or for a particular purpose. Secondly, it was paid in circumstances which make it improper for the Official Receiver to retain it, and as an officer of the Court he ought to be ordered to restore it to the source from which it came.

[ATKIN L.J. You suggest that it was paid under a mistake of fact ?]

Yes, no man in his senses would have paid this money if he had known that a receiving order had been made.

Upon the authorities it has always been assumed that where money has been paid to the bankrupt under a mistake of fact it can be recovered. If paid under a mistake of law the obligation that it cannot be recovered cannot be relied upon by an officer of the Court: *Ex parte James.* (1) Horridge J. has assumed that the rule does not apply unless the trustee has done something which has contributed to the mistake.

[DUKE L.J. It must be shown that the trustee has demanded money to which he was not entitled ?]

Yes. So here. But the conduct of the trustee had nothing to do with the decision in *Ex parte James.* (1)

In *Ex parte Simmonds* (2) the matter was carried a little further. There the trustee had paid away the money in the distribution of dividends to the creditors, and he was directed to repay it out of other moneys coming to his hands. The

(1) L. R. 9 Ch. 609. (2) 16 Q. B. D. 308.

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principle is that when the mistake is discovered the Court will direct the trustee, as an officer of the Court, to repay the money.

[WARRINGTON L.J. Here there was no mistake in paying the money to the trustee.]

The principle applies to this case. The trustee cannot have a better right than the debtor would have had.

[ATKIN L.J. Could the appellant have recovered against the debtor ?]

Yes.

[DUKE L.J. If the money had been paid upon an erroneous claim by the debtor, could the trustee have retained it for the benefit of the creditor ?]

It is submitted not.

[WARRINGTON L.J. If before claiming the money the Official Receiver had come to the Court for direction you say that the Court would not have ordered him to make a claim to it ?]

Yes.

In re Hall (1) is relied upon as limiting the principle established, but that case is clearly distinguishable. See the judgment of Farwell L.J. (2) *Tapster* v. *Ward* (3) does not apply here. *In re Phillips* (4) is on the same lines, but is a simpler case. *Ex parte James* (5) was there cited, but it is difficult to see what it had to do with the case then before the Court. Horridge J. there said (6) that the judgment in *In re Tyler* (7) was limited to cases where there is some knowledge on the part of the trustee. When the trustee finds that there is a sum of money which can be identified as the proceeds of a payment which would never have been made had the person who made it known the facts, he will be directed by the Court to return the money, on the ground that judged by the standard which should actuate an officer of the Court the money is the money of the claimant and not of the bankrupt. Moreover, this money was paid for a specific purpose—namely

(1) [1907] 1 K. B. 875.
(2) [1907] 1 K. B. 879.
(3) 101 L. T. 503.
(4) [1914] 2 K. B. 689.
(5) L. R. 9 Ch. 609.
(6) [1914] 2 K. B. 689, 692.
(7) [1907] 1 K. B. 865.

in order to enable the debtor to pay a pressing creditor, and it cannot be otherwise applied.

[WARRINGTON L.J. Your best point is what has been argued.]

The appellant intended to pay the bankers as agents for the debtor; he in fact paid it to them as agents for the Official Receiver. That was a mistake of fact.

Sir Gordon Hewart A.-G. and *E. W. Hansell* for the Official Receiver and the Board of Trade. The point is of great importance in the administration of estates in bankruptcy. The transaction was one of loan and the appellant was under no obligation to make the payment up to the time that it was actually made. If there had been no bankruptcy he could have sued the borrower and would have had no other remedy for its return: *Chambers* v. *Miller*. (1) The doctrine of mistake of fact only applies where the person making the payment makes it under the mistaken idea that he was under an obligation to make it: *Aiken* v. *Short*. (2) The utmost that can be said in this case is that the appellant would not have made the payment if he had known of the existence of the receiving order.

The property in this money passed to the debtor and afterwards by virtue of the bankruptcy law to his trustee, unless having regard to *In re Tyler* (3) and the other authorities the Court orders the trustee to repay it. Under the Bankruptcy Act, 1914, all the property of the bankrupt between the commencement of the bankruptcy and discharge vests in the trustee. After-acquired property can be dealt with by the debtor until the trustee intervenes.

[They referred to Bankruptcy Act, 1914, ss. 7, 38 (2.) (*a*), 53 (1.) and 74.]

If the appellant had known of the receiving order no doubt he would not have advanced the money. There was no dishonesty in the debtor taking it, and there is none in the trustee retaining it for the benefit of the creditors.

Before the trustee can be ordered to return or to refrain from

(1) (1862) 13 C. B. (N. S.) 125.
(2) (1856) 25 L. J. (Ex.) 321; 1 H. & N. 210.
(3) [1907] 1 K. B. 865.

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claiming money on behalf of the bankrupt's estate it must be shown that there is something which would make it improper for him to apply the normal procedure of the bankruptcy law. The appellant could not have recovered the money from the debtor: *Aiken* v. *Short*. (1)

[DUKE L.J. referred to *Marzetti* v. *Williams*. (2)

ATKIN L.J. Suppose there were an agreement to lend and a receiving order were made against the borrower before the advance, would this not be a good defence to an action for breach of the agreement?]

It is submitted not.

Here the appellant was put upon inquiry before he completed the loan because he knew that the object of it was to satisfy a pressing creditor. The fact that the payment was made after the date of the receiving order only affects the question of proof. Money paid to a debtor after a receiving order becomes the debtor's money until adjudication when it passes by statutory assignment to the trustee. The mistake alleged does not affect the contract or its subject-matter. A receiving order does not affect the status of the debtor in any way. It is only a step towards adjudication. It is the subsequent adjudication which affects the status. A receiving order merely prevents a person who has got goods from handing them over to the debtor. There is no divesting of the ownership of property until adjudication. A composition does not in any way divest the debtor of his assets.

[ATKIN L.J. If there was a composition now the appellant would not get paid.]

The principle laid down in *Ex parte James* (3) is that where there is an asset which prima facie forms part of the debtor's property the Court will not suffer its officer to deal with in a manner in which a high-minded man would not have dealt with it. In that case money had been paid under a mistake of law.

In *Ex parte Simmonds* (4) a distinction was sought to be drawn that in that case the money had been distributed

(1) (1856) 25 L. J. (Ex.) 321; 1 H. & N. 210.
(2) (1830) 1 B. & Ad. 415.
(3) L. R. 9 Ch. 609, 614.
(4) 16 Q. B. D. 308.

amongst the creditors, but it was held that that made no difference and that the trustee must repay it out of moneys coming to his hands and applicable to payment of dividends to the creditors.

The principle of *Ex parte James* (1) was very much extended in *In re Tyler* (2), where Farwell L.J. says that some limitation must be placed on the direction that an officer of the Court must act as a high-minded man would act. The Court is not here to consider what the debtor has done, but what its officer is proposing to do.

The judgment of Farwell L.J. in *In re Hall* (3) is relied upon by the respondents as showing the grounds on which the principle established in these earlier cases proceeded. Farwell L.J. there said that "The principle rests on the act or omission of the trustee in bankruptcy acting as the officer of the Court, and not on any mere mistake made by a third party with whom the officer has nothing to do." That view was concurred in by Cozens-Hardy M.R. in *Tapster* v. *Ward.* (4) See also *In re Phillips* (5); *In re Stokes.* (6)

It is submitted that there is nothing in this case to induce the Court to say that the sum in question ought not to follow the bankruptcy destination. The case may be a hard one but that fact does not entitle the appellant to repayment.

Kerly K.C. in reply.

Cur. adv. vult.

July 31. WARRINGTON L.J. read the following judgment:— The question in this appeal is whether the circumstances of this case justify the exercise by the Court of the jurisdiction it has often asserted of directing its officer—in this case a trustee in bankruptcy—to pursue a line of conduct which an honest man actuated by motives of morality and justice would pursue, although not compellable thereto by legal process.

The facts are these. The appellant Mr. Abdy, an officer in the army, became acquainted with the debtor, a retired

(1) L. R. 9 Ch. 609.
(2) [1907] 1 K. B. 865, 871.
(3) [1907] 1 K. B. 875, 879.
(4) 101 L. T. 503.
(5) [1914] 2 K. B. 689, 692.
(6) [1919] W. N. 110; since reported [1919] 2 K. B. 256.

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naval captain, in October, 1918. In the middle of November the debtor asked the appellant if he would lend him 1000*l.* to enable him to discharge a pressing debt. The appellant consulted his solicitor and found that he could only raise the money by insuring his life and mortgaging the policy. He thereupon stipulated that the debtor must agree to repay not only the 1000*l.* but the expenses of effecting the policy, including the premium. Pending the effecting of the insurance the appellant paid 100*l.* to the debtor on account by means of a promissory note guaranteed by his solicitor, and the transaction was completed on January 3, 1919, by the advance of the further sum of 900*l.* to the debtor on his signing an agreement of that day by which he bound himself to pay to the appellant the sum of 1272*l.* on July 3, 1919, with interest at 6 per cent. The 272*l.* was the amount of the premium and expenses above referred to.

The 900*l.* was paid to the debtor's bankers. Out of it they paid themselves the amount of an overdraft due to them, leaving a balance of 764*l.* 0*s.* 5*d.* in their hands.

It subsequently appeared that unknown to the appellant and his solicitor and (as was said by the debtor) to him also a receiving order had been made against him on January 2. The appellant and his solicitor were also ignorant of the facts that the debtor had committed an act of bankruptcy and that a petition had been presented, though these latter facts must of course have been known to the debtor.

The appellant states that had he known that a receiving order had been made he would not have paid the 900*l.* to the debtor, and there is every reason to accept this statement.

The Official Receiver, as trustee in bankruptcy, having required the bank to pay him the 764*l.* 0*s.* 5*d.*, and having received it from them the appellant applied by motion to the Court in Bankruptcy that the loan transaction be declared void, and or rescinded and that the Official Receiver do repay to the appellant the 764*l.* 0*s.* 5*d.* above mentioned. This money was in fact at the time of the application still in the hands of the Official Receiver.

On May 12, 1919, Horridge J., sitting in Bankruptcy, dis-

missed the appellant's motion with costs; hence this appeal. Before Horridge J. it was contended that the loan transaction ought to be set aside on the ground of common mistake or mistake of fact as to something affecting the subject-matter of the contract, but it was also contended that even if there was no legal right in the appellant to rescind the transaction and so recover the money it would not under the circumstances be in accordance with strict notions of honesty and justice for the Official Receiver to retain it, and the Court ought in exercising control over its officer to order him to do that which a strictly honest man would do—namely, to repay the 764*l.* 0*s.* 5*d.* to the appellant.

Horridge J. arrived at a conclusion adverse to the appellant on his legal claim, and, on his appeal to the Court's discretionary jurisdiction, was of opinion, for reasons which do not clearly appear from his judgment, that the case was not one in which the Court ought to interfere with the legal title. Before this Court the legal claim was hardly pressed, and, without going so far as to say it could not succeed, I will assume that it ought not to do so. The question then arises whether the Court ought to exercise the discretionary jurisdiction over its officer to which I have referred.

The first matter to be determined is what are the limits of the jurisdiction. The first case in which the jurisdiction in question appears to have been exercised in the case of a trustee in bankruptcy is *Ex parte James.* (1) In that case an execution creditor acting under what proved to be a mistaken view of the law voluntarily paid the proceeds of his execution to the trustee in bankruptcy of the debtor. On an application by the execution creditor for repayment by the trustee, the Court ordered the trustee to repay notwithstanding that he could not by law be compelled so to do. The ground of the decision is thus stated by James L.J.: "A trustee in bankruptcy is an officer of the Court. . . . . The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of

(1) L. R. 9 Ch. 609, 614.

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Bankruptcy ought to be as honest as other people." In saying that the trustee had money in his hands which "in equity" belonged to some one else, the learned Lord Justice did not mean that a Court of equity would, as between litigants, hold that the money belonged to the supposed claimant, but was using the word "equity" in a wider and more popular sense. See per Vaughan Williams and Buckley L.JJ. in *In re Tyler*. (1)

The principle laid down in *Ex parte James* (2) was again applied by this Court in *Ex parte Simmonds*. (3) In that case the trustees of a settlement had for many years, under a mistake as to their legal obligations, paid certain surplus income to the trustee in liquidation of a debtor. The money so paid had been expended in payment of dividends. The Court, on the application of the surviving trustee who had then discovered his mistake, ordered the trustee in liquidation to repay the money out of other moneys coming to his hands and applicable for payment of dividends. The principle was laid down by Lord Esher M.R. in the following terms: "A rule has been adopted by Courts of law for the purpose of putting an end to litigation, that, if one litigant party has obtained money from the other erroneously, under a mistake of law, the party who has paid it cannot afterwards recover it. But the Court has never intimated that it is a high-minded thing to keep money obtained in this way; the Court allows the party who has obtained it to do a shabby thing in order to avoid a greater evil, in order that is, to put an end to litigation. But James L.J., laid it down in *Ex parte James* (2) that, although the Court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its own officer to act so. It will direct its officer to do that which any high-minded man would do, viz., not to take advantage of the mistake of law. This rule is not confined to the Court of Bankruptcy. If money had by a mistake of law come into the hands of an officer of a Court of Common Law, the Court would order him to repay it so soon as the mistake was dis-

(1) [1907] 1 K. B. 865, 869, 873. (2) L. R. 9 Ch. 609.
(3) 16 Q. B. D. 308, 312.

covered. Of course, as between litigant parties, even a Court of Equity would not prevent a litigant from doing a shabby thing. But I cannot help thinking that, if money had come into the hands of a receiver appointed by a Court of Equity through a mistake of law, the Court would, when the mistake was discovered, order him to repay it. A trustee in bankruptcy has always been treated as an officer of the Court of Bankruptcy, and the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish L.JJ., in *Ex parte James*." (1)

In both these cases it will be observed that there was nothing dishonest on the part of the trustee in demanding and receiving the money in question: in each case he reasonably believed that he was entitled to it. What the Court thought would be dishonest was that he should retain the money when the mistake had been pointed out.

The principle has been followed and applied in many other cases, but I propose to refer to one only for a reason which will appear hereafter, that is *In re Tyler*. (2) In that case the bankrupt's wife, in pursuance of a request made by the bankrupt before his bankruptcy, had paid the premiums on a policy of assurance on the life of the bankrupt. After his death the trustee in his bankruptcy received the policy moneys and the wife applied for the payment to her thereout of the amount of the premiums paid by her. The fact that the premiums were being paid by the wife had been disclosed by the bankrupt to the deputy of a former Official Receiver in the course of an examination. All three judges seem to have thought that the wife might establish a legal right to the premiums, but being asked by the Solicitor-General to determine what is the true principle of *Ex parte James* (1) and *Ex parte Simmonds* (3), they all three delivered judgments on this point on the assumption that the wife had no legal right. It is unnecessary to read the judgments of all the Lords Justices on this point; they all agree in substance though they use different language. I will read a passage

(1) L. R. 9 Ch. 609. (2) [1907] 1 K. B. 865.
(3) 16 Q. B. D. 308.

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from the judgment of Buckley L.J. as putting the matter in the clearest possible way (1): "In *Ex parte James* (2) James L.J. speaks of money which in equity belongs to some one else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense, and not in the sense of money which in a Court of Equity would belong to some one else. I think the context of his judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (3) Lord Esher, referring to *Ex parte James* (2), says that the Court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do. In *Ex parte Simmonds* (3), the Court were extending the doctrine of *Ex parte James* (4) in this sense, that they were holding, not merely that if the trustee had the money still in his hands he ought to hand it to the person who in point of justice was entitled to it, but that if he had parted with the money but there was other money coming in from the bankruptcy he ought out of such other money to make good the fund which he had by error misappropriated." In this case as in the previous cases there had been nothing which would be inconsistent with the strictest honesty in the conduct of the trustee except in insisting on retaining the policy money without payment of the amount of the premiums paid by the wife when he had ascertained the facts. The knowledge imputed to the former trustee and through him to the trustee at the date of the death of the debtor was relied upon only as one of the facts rendering it in the opinion of the Court dishonest on the part of the latter to retain the benefit of the wife's payment without making it good to her. This is put with admirable clearness by Buckley L.J. in the following passage in his judgment (5): "Under these circumstances,

(1) [1907] 1 K. B. 865, 873.
(2) L. R. 9 Ch. 609.
(3) 16 Q. B. D. 308.
(4) L. R. 9 Ch. 614.
(5) [1907] 1 K. B. 874.

looking beyond rights enforceable in a Court of Law or Equity, the real fact is that the policy moneys payable in 1906 originated from and owed their existence to the premiums which the wife to the knowledge of the trustee had paid, and it would be grievously unfair, and contrary to natural justice between man and man, that whereas she kept up the policy yet when the life dropped somebody else should take the money. She may not have an enforceable claim, but as matter of justice it cannot be right, when the time comes for the payment of the moneys due on the policy, to allow the trustee to turn round and say 'I knew you were keeping down the premiums, but I shall take the policy moneys, and you shall go without the money you have paid.' "

But it is said that in *In re Hall* (1), decided after but on the same day as *In re Tyler* (2) there are expressions which show that the principle expounded in *In re Tyler* (2) is not to be taken to be as wide as the judgments in that case would appear to make it. It is said it is only applied where the trustee has been pursuing what the Court thinks is a dishonest course of conduct and appears to be minded to continue it. If the judges really intended so to limit that principle it would be an extraordinary thing that they did not do so in *In re Tyler* (2), when they were deliberately expounding the principle, but reserved the limitation for the judgment delivered immediately afterwards in a case in which the principle in its wider scope was plainly inapplicable. The judgment mainly relied upon is that of Farwell L.J. He there says (3): "The distinction between this and the last case (*In re Tyler* (2)) is to my mind apparent. In this case the officer of the Court has neither done nor omitted anything which could give rise to the suggestion that he has committed the Court to a course of conduct which is in any way unworthy of its dignity. The mortgagees choose to make these payments of 4s. in the pound on their own initiative without a suggestion from the trustee, in the hope of avoiding the bankruptcy by carrying through the composition. I have

(1) [1907] 1 K. B. 875. (2) [1907] 1 K. B. 865.
(3) [1907] 1 K. B. 879.

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already explained that the principle is that the officer of the Court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the Court so as to commit the Court to acts which it would feel bound to repudiate. In the last case, for example, my judgment proceeded on the knowledge of the trustee in the bankruptcy of the existence of the policies and the necessity for paying the premiums and the fact that the wife was paying them. Different considerations would have arisen altogether if the trustee had been ignorant of the existence of any policy at all and then, after the life had dropped, the wife had come to the trustee and said that she had been paying the premiums. That would have been a mere mistake of law, which I will deal with when it arises, but certainly I should require to consider a good deal more closely before I decided that case in favour of the wife, because to my mind the principle rests on the act or omission of the trustee in bankruptcy acting as the officer of the Court, and not on any mere mistake made by a third person with whom the officer has nothing to do." This is I think consistent with the view that it is enough in order to apply the principle to find as to the thing which the trustee is about to do or omit to do that it would be dishonest to do it or omit to do it. The previous course of conduct in both parties may be material on the question whether it would be dishonest to do or omit the action in question, but that is all. I am quite sure that is all that Farwell L.J. meant in the expressions he has used.

Tapster v. *Ward* (1), and *In re Stokes* (2), were cited in support of the trustee's case. In each of these cases the debtor himself had kept up a policy which he had not disclosed to the trustee, and on his death his executor claimed to be repaid the premiums out of the policy moneys. Here the dishonesty, if any, was on the part of the debtor himself. It would have been a perversion of the principle expounded in *In re Tyler* (3) to have applied it in those cases.

We have here a trustee in bankruptcy in possession of

(1) 101 L. T. 25, 503.
(2) [1919] W. N. 110; since reported [1919] 2 K. B. 256.
(3) [1907] 1 K. B. 865.

money of the bankrupt which he knows was lent to him by Mr. Abdy in ignorance of the fact that on the day before the payment a receiving order had been made and which would not have been so lent if the facts had been known to the lender. I think under such circumstances an honest man would on ascertaining the facts at once repay the money, and, in my opinion, the trustee must be ordered to pay the 764*l.* 0*s.* 5*d.* accordingly.

The debtor is not before us except so far as the trustee represents him. If there are any rights or obligations arising out of the loan transaction which, notwithstanding the bankruptcy, remained vested in or binding on the debtor these will not be affected by our order, save, of course, so far as they may be affected by the repayment of the 764*l.* 0*s.* 5*d.*

I think the applicant is entitled to the costs of this appeal, but, inasmuch as the trustee was entitled to have the decision of the Court in the matter, there should be no costs in the Court below.

DUKE L.J. read the following judgment:—The sum in question 764*l.* is claimed by the appellant on three grounds—namely, that the appellant is entitled to it at law as a sum paid under a mistake of fact, that he is entitled to it in equity under a trust by which the trustee in bankruptcy is bound, and that if he is not entitled either at law or in equity upon principles binding in courts of justice as between ordinary litigants, nevertheless the trustee ought upon grounds of common honesty and fair dealing to pay the sum to him, and that the Court in its discretion should direct him to do so.

The money in question was received by the trustee from the bankers of the bankrupt upon his claiming it after his appointment as a sum then standing to the credit of the bankrupt in their books. It was not disputed in the course of the argument that the 764*l.* which was paid over was the balance in the bankers' hands of moneys advanced by the appellant to the bankrupt, though questions are raised as to whether the appellant could have recovered it from the bankrupt as a specific sum or have successfully invoked the equitable juris-

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diction of the Court in order to repossess himself of it. These questions have necessitated a careful examination of the transaction which led to the payment being made to the bankers by the appellant.

The appellant's account of the transaction is that in November, 1918, he had consented to raise money and to make a loan to the bankrupt upon the terms that the bankrupt should indemnify him against the expense of the transaction, that 100*l.* was provided and advanced in pursuance of this promise in December, and that on January 3, after the execution of an agreement for repayment, the balance of 900*l.* was paid to the bankrupt's bankers. The appellant and his solicitor did not know, and the bankrupt did not know at the time of the payment of 900*l.*, but it was the fact, that on January 2 a receiving order had been made against the bankrupt. Nor did the appellant know, though the bankrupt did, of the proceedings in bankruptcy which led up to the making of the receiving order. The bankrupt states that when the petitioning creditor began to press him he told the appellant that he was being pressed by a creditor, that the appellant thereupon offered to lend him 1000*l.*, that 100*l.* of this sum was paid in December, that the agreement in respect of the transaction was executed on January 3, and the balance of 900*l.* paid to the bankrupt's account on January 4. The bankrupt knew that a petition in bankruptcy against him stood for hearing on January 2, but not that a receiving order was made. The 100*l.* paid to him in December was spent by him on his personal expenses and about 80*l.* due to his bankers in respect of an overdraft was with his knowledge retained by the bankers out of the 900*l.*

There was no express stipulation as to the mode of appropriation of the borrowed money or for its return by the bankrupt to the appellant in case the bankrupt found himself unable to satisfy the creditor who was pressing him. Nor do I see any evidence of an agreement between the parties that the loan was only to be carried out if the debtor found he could make the desired settlement. Upon proof of these facts, or either of them, the appellant would I think have been entitled

to recover any part of the 1000*l.* which remained under the bankrupt's control at the time of his being adjudicated bankrupt. The bankrupt spent 100*l.* of the 1000*l.* upon his personal expenses, and he appears to have intended that his bankers should appropriate 136*l.* or thereabouts to make good his overdraft and other liabilities. It could not, in my opinion, be accurately said that there was a trust created by the agreement of the bankrupt and the appellant, in respect of the 1000*l.* or any specified part of that amount. As to this I agree with the opinion of Horridge J.

It is not so clear to me as it was to the learned judge that there was no mistake on the appellant's part as to the facts material to the transaction in respect of which he made his arrangement with the bankrupt. The appellant believed on January 4, 1919, that the bankrupt could then receive 900*l.* for the purpose of paying that sum or part of it to a creditor whose claim against him dated from October or November, 1918, so as to discharge that claim. He believed the bankrupt to be subject to no disability which would prevent him from making binding arrangements with his creditor or from disposing of assets to which he had become or might become entitled. In this he was mistaken. Whether this was a mistake in the transaction itself, or only a mistake in a collateral matter, seems to me to be the material question on this part of the case. Mistakes as to the rights possessed by parties to contracts, or their competency to make contracts which they purport or intend to make, is a ground on which contracts may under some circumstances be avoided: *Robinson* v. *Dickenson* (1) and *Cochrane* v. *Willis* (2) are instances of such mistakes. But in the present case the bankrupt is not personally party to the litigation, and the trustee in his bankruptcy is not concerned with the contract of loan, except to the extent to which its admitted existence furnished prima facie proof that the money in question was part of the bankrupt's estate divisible among his creditors. It is, moreover, unnecessary to decide whether at the time when the payment in question was made to the bankers the bankrupt could upon

(1) (1828) 3 Russ. 399. (2) (1865) L. R. 1 Ch. 58.

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the true state of the facts have maintained any action against the appellant if the appellant instead of paying the money had repudiated the transaction. For reasons which I am about to state I am of opinion that whatever be the true answer to that question the trustee in bankruptcy ought not to retain the sum in question.

The appellant is, as I think, entitled to relief under the rule as to administration of estates in bankruptcy laid down in *Ex parte James* (1); *Ex parte Simmonds* (2); and *In re Tyler*. (3) The principle on which, as it appears to me, the Court is now bound to proceed in such a case as the present is that which is enunciated very distinctly in the judgments of James L.J. in *Ex parte James* (1), Lord Esher M.R. in *Ex parte Simmonds* (2); and Lord Wrenbury, then Buckley L.J., n *In re Tyler* (3)—namely, that the trustee in bankruptcy is an officer of the Court, and in deciding what is his duty with regard to a contested claim in which he is concerned as trustee, the Court must consider not merely whether he has a cause of action or right or a defence or answer which would prevail at law or in equity as between ordinary litigants, but also what in point of honesty the trustee ought to do in respect of the facts of the case. The position of the trustee in bankruptcy as an officer of the Court is the material matter. The Court "ought" as James L.J. said in *Ex parte James* (4), "to set an example." It "ought to be as honest as other people"—that is to say it ought to be "honest." Lord Esher M.R., in *Ex parte Simmonds* (5) said, with regard to the control of the Court over a trustee in bankruptcy, "the Court will order him to act in an honourable and high-minded way, and so it was laid down by James and Mellish L.JJ., in *Ex parte James*." (1) Vaugham Williams L.J. in *In re Tyler* (6) agrees in the view expressed in both the previous cases. "When James L.J. says (in *Ex parte James* (1) that the trustee has in his hands money which in equity belongs to somebody else, he is not

(1) L. R. 9 Ch. 609.
(2) 16 Q. B. D. 308.
(3) [1907] 1 K. B. 865.
(4) L. R. 9 Ch. 614.
(5) 16 Q. B. D. 312.
(6) [1907] 1 K. B. 869.

referring to an equity which is capable of forensic enforcement in a suit or action, but he is referring to a moral principle which he describes when he says that the Court of Bankruptcy ought to be as honest as other people." Lord Wrenbury's judgment in *In re Tyler* (1) explains still more fully the principle of the decision in *Ex parte James*. (2) "In *Ex parte James*," (3) he says, "James L.J. speaks of money which in equity belongs to some one else. In my judgment he there meant money which in point of moral justice and honest dealing belongs to some one else. He was using the words in a popular sense, and not in the sense of money which in a Court of equity would belong to some one else. I think the context of his judgment plainly shows that that was his meaning. In *Ex parte Simmonds* (4) Lord Esher, referring to *Ex parte James* (3), says that the Court will direct its officer to act as any high-minded man would act—namely, not to take advantage of a mistake of law. That is to say, assuming that he has a right enforceable in a court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do."

Emphasis was laid by Mr. Hansell in his argument on behalf of the trustee in bankruptcy upon passages in the judgments in the three cases to which I have referred, and in the judgments in *In re Hall* (5) and *Tapster* v. *Ward* (6), which were said to confine the principle of *Ex parte James* (2) within narrower limits than those which I have endeavoured to define. In particular reliance was placed upon some observations contained in the judgment of Farwell L.J. in *In re Hall* (5), and the concurrence therein of Lord Cozens-Hardy M.R. in his judgment in *Tapster* v. *Ward*. (6) What has been said by Farwell L.J. (7) is that the principle is that "the officer of the Court must not embark upon a course of conduct,

(1) [1907] 1 K. B. 873.
(2) L. R. 9 Ch. 609.
(3) L. R. 9 Ch. 614.
(4) 16 Q. B. D. 308.
(5) [1907] 1 K. B. 875.
(6) 101 L. T. 503.
(7) [1907] 1 K. B. 879.

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either of omission or commission, which is unworthy of the Court, so as to commit the Court to acts which it would feel bound to repudiate." And again, "the principle rests on the act or omission of the trustee in bankruptcy acting as the officer of the Court." Mr. Hansell referred also in support of his contention in the present case to the judgments of Horridge J. in *In re Phillips* (1), and *In re Stokes* (2), both of them decisions in the exercise of the jurisdiction of the Court in Bankruptcy. In none of the group of cases now under consideration did the question arise which has to be determined upon the present appeal. In *In re Hall* (3) a mortgagee claimed as against a trustee in bankruptcy to be entitled to add to his security moneys due from his debtor to third parties which he had paid for purposes of his own, and in each of the cases in bankruptcy the bankrupt had concealed part of his assets, and a claim thereby was made as against the trustee in bankruptcy by a third party who had had no dealings with the trustee. The discussion of the principle of *Ex parte James* (4) arose only with regard to a state of facts which rendered its application impossible. A broad principle of general application was laid down in the three leading cases; its generality cannot be diminished by reason that other cases upon their facts were held not to fall within the principle. The principle to be applied is that the Court in Bankruptcy ought not to allow its officer to insist upon a rule of law or equity in the administration of an estate in bankruptcy under the control of the Court where such insistence would produce an unjust and dishonest result. The trustee in the present case claims to be entitled as of legal right to retain a sum of money which would not have been paid by the appellant to the bankrupt's account if he had known of the receiving order. In my opinion the bankrupt could not honestly have received this sum and the trustee ought to be directed to refund it.

The appeal should be allowed.

ATKIN L.J. read the following judgment:—This is an appeal

(1) [1914] 2 K. B. 689.
(2) [1919] W. N. 110; since reported [1919] 2 K. B. 256.
(3) [1907] 1 K. B. 875.
(4) L. R. 9 Ch. 609.

from an order of Horridge J. sitting as Bankruptcy judge dismissing a motion by Mr. Abdy which asked for an order that a loan transaction between himself and the debtor be declared void or rescinded and that the Official Receiver repay to the applicant the sum of 764*l.* 0*s.* 5*d.*, part of a sum of 900*l.* paid to the debtor by Mr. Abdy. The claim is based upon the principle said to be established by *Ex parte James* (1) and subsequent cases that in administering estates in bankruptcy the Court can look beyond the legal rights of the parties, and will direct its officers to act as an honourable and right-minded man would act in dealing with his own affairs. It is said that the facts here are such as to require the Official Receiver acting in accordance with the foregoing principle to return the money. To come to a correct conclusion it is necessary to examine the facts and the authorities which are relied on in support of the principle.

[His Lordship stated the facts and continued :] It is undisputed that neither the applicant nor his solicitor at any material time had any notice of any act of bankruptcy petition or receiving order, and this case must be determined on the footing that the debtor when he received the 900*l.* did not know that the receiving order had been made. The debtor was adjudicated bankrupt on February 7. The result of the receiving order was undoubtedly to defeat the object of the loan transaction—namely, to relieve the debtor from pressure by a creditor. Its existence placed the 900*l.* in the custody of the Official Receiver as receiver of the debtor's property. As soon as adjudication followed the money vested in the Official Receiver as trustee, and in the absence of a composition or scheme of arrangement, the possibility of which was not suggested in this case, adjudication under the Bankruptcy Act, 1914, necessarily follows. Moreover, if, as was contended by the Board of Trade before us, the loan transaction created an obligation upon the debtor for the first time on January 3, the applicant had no right of proof against the assets of the debtor, for the right of proof by s. 30 is limited to debts and liabilities to which the debtor is subject at the date

(1) L. R. 9 Ch. 609.

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of the receiving order. His remedy as the learned judge no doubt ironically observed is to present another petition. The result would be a second adjudication, in which the trustee would be entitled to distribute all the assets of the debtor to which the trustee in the first bankruptcy was not entitled. In truth, the loan transaction between the two officers became nugatory. The 900*l.* instead of a loan to the debtor was a gift to the creditors. The covenant to repay in six months' time might have been written in water. It was not disputed that if the debtor had known of the receiving order on January 3, it would have been dishonourable of him to have received the money.

Under these circumstances the applicant claims to have the money returned to him on the footing that it would be dishonourable of the debtor to hold it as soon as he knew the circumstances, and that it would be equally dishonourable of the Court of Bankruptcy through its officer, the Official Receiver, to hold it, and he relies on cases such as *Ex parte James* (1) and *In re Tyler* (2) to show that the Court will look beyond the bare legal rights of the parties and direct its officer to act as an honourable and high-minded man should. The contention of the Board of Trade, as I understand it, is that however true that proposition may be where the officer of the Court has himself done or omitted to do something which commits the Court to a dishonourable course, the rule has no application where all the officer has done is to find the debtor in legal ownership of property, and to assert his right to it as part of the debtor's property. In that case the dishonourable person is the debtor, and, however soiled his possession may be, the Court receives the property with clean hands. It becomes necessary to consider the relevant cases.

In *Ex parte James* (1) the sheriff had seized under a fi. fa. goods of the debtor, and after holding for 14 days had paid the proceeds to the execution creditor. The sheriff had notice of a petition by the debtor for liquidation by arrangement which had become abortive. After payment by the sheriff a creditor filed a petition in bankruptcy relying as he was

(1) L. R. 9 Ch. 609. (2) [1907] 1 K. B. 865.

entitled to do on the abortive petition for liquidation. The debtor was adjudicated bankrupt and the trustee claimed the proceeds of the execution from the execution creditor relying upon the notice to the execution creditor of the petition for liquidation, being the act of bankruptcy, upon which the order of adjudication was made. It happened that on February 20, 1874, Mellish L.J. sitting on appeal in bankruptcy in a case of *Ex parte Villars* (1), in very similar circumstances had decided in favour of the trustee; and on February 23, 1874, the execution creditor being advised that he had no defence paid over the money to the trustee. Later, on May 8, the full Court of Appeal reheard the case of *Ex parte Villars* (1) and reversed the decision, Mellish L.J. being a member of the Court. The execution creditor thereupon claimed to have the money repaid to him. One of the defences set up by the trustee was that the money had been paid to him voluntarily and under a mistake of law, and was irrecoverable. The Court, James and Mellish L.JJ., ordered the money to be repaid. James L.J. said (2): "A trustee in bankruptcy is an officer of the Court. . . . . The Court, then, finding that he has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people." It is to be noted that the only act or omission of the trustee other than the omission to repay the money when finally demanded was to claim the money in the first instance from the execution creditor. In making that claim he was asserting a view of the law which had at first commended itself to Mellish L.J. himself, and the payment was made to him by the creditor and received by him after the judgment of Mellish L.J. and after the creditor had received legal advice. It would be perverse to suppose that in acting as he did in claiming and receiving the money under such circumstances the trustee was in any way tainted with any kind of dishonour. If it is said that he must by a fiction be supposed to have known the law as subsequently laid down by the full Court, the answer

(1) (1874) L. R. 9 Ch. 432. (2) L. R. 9 Ch. 614.

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is by the same fiction so must the creditor. In truth the only act or omission by the trustee capable of complaint was holding the money after the rights of the parties were ascertained.

In *Ex parte Simmonds* (1) the trustees of a settlement for a period from 1875 to 1883 under a mistake of law paid to the trustee in the liquidation of the tenant for life certain income to which the trustee was not entitled. They did so in consequence of a notice served on them by the trustee in the liquidation. The trustee in the liquidation as the income was received distributed it in dividends amongst the creditors. On discovering their mistake the trustees of the settlement applied to the Court of Bankruptcy for an order that the trustee should pay to them out of assets in hand the sums so paid to him within the past six years. It is to be noted that the actual funds so paid had been distributed. This made no difference; the Court made the order. I need not repeat the passage from Lord Esher's judgment read by my Lord. There is no suggestion in the judgments that the decision turned on something done or omitted to be done by the trustee —some trick or unfair dealing or sharp practice. The reference to the mistake of the officer by Lindley L.J. is the mistake not in asking for the money but in distributing it when received. Later he uses the phrase "injustice which has been inadvertently done."

It appears to me that the principle as stated in these two decisions is not limited in its application to cases of money paid under a mistake of law. The two cases however were both of this description.

One may notice the next case in order of date, also of money paid under a mistake of law: *In re Rhoades*. (2) There the executor who was also a creditor of the testator in ignorance of his right of retainer paid over all the assets he had got in to the Official Receiver, in whom the assets vested under an order made for the administration of the estate of the testator who was insolvent. In this case it is not suggested that the Official Receiver did anything at all except receive the money. It does not appear that he asked for it, or that he knew that

(1) 16 Q. B. D. 308. (2) [1899] 2 Q. B. 347, 355.

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the executor had any claim. Nevertheless the Court of Appeal affirming Wright J. ordered the Official Receiver to repay the amount of the debt to the executor. Lindley M.R. says: "*Ex parte James* (1) and *Ex parte Simmonds* (2) are distinct authorities to shew that mistakes of this kind, although attributable to ignorance of law, can and will be set right by the Court so long as the officer of the Court still has the money in his hands."

In *In re Tyler* (3) an attempt was made by counsel for the Board of Trade, the Solicitor-General, to have this doctrine limited to cases of money paid under a mistake of law. It failed, and the Court intentionally, as I think, put the principle on a broad basis. The facts are instructive. In 1893 the debtor was possessed of two life policies and mortgaged them to his bank. In 1895 being embarrassed he asked his wife to pay the premiums, which she did until the debtor's death in 1906. In August, 1896, the debtor was adjudicated bankrupt. One Davis was appointed trustee; subsequently he was succeeded as trustee by the Official Receiver. The debtor died in 1906, the bank, the mortgagees, collected the policy moneys and after deducting the amount due to them, paid the balance, 514*l.*, after notice by him to the Official Receiver. The wife claimed to be repaid 481*l.*, the amount paid by her for premiums and interest on the loan. Neither the Official Receiver nor his predecessor as trustee knew that the wife had been paying the premiums and interest; but the debtor had disclosed the fact for the first time in 1901 to a clerk of the Official Receiver in the course of a preliminary examination as to his affairs. In that case the balance was rightly claimed by the Official Receiver from the bank; it plainly formed part of the debtor's estate, and as to the portion in excess of the wife's claim there was no dispute as to the Official Receiver's title. The only fact that brought the principle into play was the knowledge of the trustee for the time being, six years after the wife had begun to pay the premiums, that she was paying them. Under these circum-

(1) L. R. 9 Ch. 609. (2) 16 Q. B. D. 308.
(3) [1907] 1 K. B. 865.

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stances it was held to be unjust that the officer of the Court should hold the money without recouping the wife the premiums she had paid both before and after the date when knowledge was acquired. The judgments have been read and I do not propose to repeat them. I only desire to remark that if Farwell L.J. meant in his judgment to characterise as a "dirty trick" the conduct of the trustee in *Ex parte James* (1) in asking for the money, for the reasons I have already given, there seems no foundation for the criticism. I do not understand a constructive dirty trick. In applying this principle we have to deal with real and substantial dishonesty or unfairness or injustice, and not to rely on any fiction of law. The true principle seems to me to be summed up in the words of Buckley L.J. (2): "That is to say, assuming that he has a right enforceable in a Court of justice, the Court of Bankruptcy or the Court for the administration of estates in Chancery will not take advantage of that right if to do so would be inconsistent with natural justice and that which an honest man would do."

On the same day the Court of Appeal gave judgment in *In re Hall.* (3) There the mortgagees of a debtor proceeded to pay a composition to his creditors with notice of an act of bankruptcy, believing, as it was said, that they could add the sums so paid to the mortgage debt. They realized the mortgage security and claimed to defray the sums so paid out of the sum realized. It was held that they could not. I am quite at a loss to see how it could be suggested that there was any sort of a moral obligation upon the Official Receiver to allow such a claim, and the Court so held. Farwell L.J. in his judgment says: "I have already explained that the principle is that the officer of the Court must not embark upon a course of conduct, either of omission or commission, which is unworthy of the Court so as to commit the Court to acts which it would feel bound to repudiate." If to hold money for distribution amongst a debtor's creditors which in honesty and fairness ought to be paid to a third party is embarking upon a course of conduct the above sentence, which is obiter, is consistent with

(1) L. R. 9 Ch. 609. (2) [1907] 1 K. B. 873.
(3) [1907] 1 K. B. 875, 879.

the facts and the decision in *Ex parte James* (1); *In re Simmonds* (2); *In re Rhoades* (3); and *In re Tyler*. (4) If not, I cannot think that the sentence correctly records the effect of the previous decisions, which were binding upon the Court of Appeal.

In *Tapster* v. *Ward* (5) a debtor in 1879 effected a policy of assurance on his own life and then presented a petition for liquidation. The policy vested in the trustee in the liquidation, but its existence was not disclosed by the debtor. In 1880 the liquidation was closed and the debtor continued to pay premiums until his death in 1907. On his death the trustee in the liquidation who was then represented by the Official Receiver and who never had received any notice of the existence of the policy or the payment of premiums by the debtor claimed the policy moneys. The personal representative of the debtor claimed not merely the premiums paid but the policy moneys. How the claim of the Official Receiver under those circumstances in effect to have the moneys of the debtor applied in payment of the debtor's creditors could be stigmatised as dishonourable or unjust or in any sense other than the claim of a high-minded man, it is difficult to conceive. The Court had no difficulty in allowing the Official Receiver's claim. In giving judgment the late Master of the Rolls refers to the passage in Farwell L.J.'s judgment in *In re Hall* (6) above cited and adopts it, and proceeds to point out, as the fact is, that in *In re Tyler* (4), a case of a claim to have refunded premiums, the deciding fact was the knowledge of the trustee that premiums were being paid. I do not think that the Master of the Rolls took the passage in Farwell L.J.'s judgment which he cited to be varying the principles laid down clearly in *In re Tyler* (4) and the previous cases, or meant himself to vary them. If he did, it is apparent that in view of the facts of the particular case, his expression of opinion was unnecessary to the decision of the case, and therefore, though entitled to the greatest weight, is not binding upon us.

(1) L. R. 9 Ch. 609.
(2) 16 Q. B. D. 308.
(3) [1899] 2 Q. B. 347.
(4) [1907] 1 K. B. 865.
(5) 101 L. T. 25, 503.
(6) [1907] 1 K. B. 875.

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In re Phillips (1), decided by Horridge J., turned on facts similar to those in *Tapster* v. *Ward*. (2) A life policy was taken out by a debtor who was then made bankrupt. He did not disclose the policy, paid the premium himself, became bankrupt a second time, and then died. It was held, as I think quite rightly, that there was no kind of moral obligation on the part of the trustee in the first bankruptcy to forego his claim to the whole of the policy moneys.

In re Stokes (3) is a similar case.

The conclusion that I derive from the cases is that the contention of the Board of Trade in this case is inconsistent with the decisions in *Ex parte James* (4) and *Ex parte Simmonds* (5), as explained in *In re Tyler* (6), and that the principle laid down in those cases has not been qualified by the later cases. It can make no difference whether the trustee himself has acquired the property by unworthy means, or whether there is vested in him by operation of law property which has been acquired by the debtor by unworthy means. If it would be dishonourable of the debtor to use the money to pay his creditors, it is equally dishonourable for the officer of the Court, knowing the full facts, to use the money to pay his creditors.

We were pressed in argument with the contention put before the Court in *In re Tyler* (7), that "great difficulties will arise in the administration of bankruptcy if the Court is to decide according to what it considers high-minded without regard to law or equity." I think that these difficulties are exaggerated. But while one may agree that opinions as to rules of honesty differ, the difficulty of recognizing honesty when she appears, affords no inadequate reason for discarding her altogether. The advantages of maintaining a high standard of commercial morality in my judgment far outweigh the suggested inconveniences of administration. If I may repeat the words of Lord Esher the proposition strikes me as a good, a righteous and a wholesome one, and I eagerly desire to adopt it.

(1) [1914] 2 K. B. 689.
(2) 101 L. T. 25, 503.
(3) [1919] W. N. 110; since reported [1919] 2 K. B. 256.
(4) L. R. 9 Ch. 609.
(5) 16 Q. B. D. 308.
(6) [1907] 1 K. B. 865.
(7) [1907] 1 K. B. 865, 868.

The application to the facts of this case, if relatively of small importance, does not appear to me to present much difficulty. Assume that the debtor knew the facts when he received the money can it be suggested that a high-minded man would have completed the transaction and received the money? He would know that the object of the transaction was defeated, that the money would go straight into the possession of the Official Receiver, and that the sweeping away of his assets in bankruptcy would make it impossible for him to comply with his covenant to repay. Can it be said that any different rule of conduct should have guided him when a day or two later he discovered the true facts? If he ought as a just man then to have restored the money, then so ought the officer of the Court who receives the money from him. It is said that the same position will always arise where money or goods are handed over in a mistaken belief as to the recipient's financial position. I do not agree. The important fact here is that the whole of the recipient's assets had been taken from his control by operation of law. The mere uncertainty that arises while a man is left with full disposing power of his available assets, such as they are, presents a different problem which can be considered when it arises. It becomes unnecessary to consider the other point raised by Mr. Kerly for the applicant. If the transaction on January 3, 1919, was really based on an agreement to lend money made in November and December, 1918, as I think might well be contended, it might be said that the whole transaction was frustrated by the making of the receiving order. The case was not argued on this footing and I express no opinion about it.

It only remains to add that the principle of *In re James* (1) has not been applied before in quite similar circumstances. Here we are directing the return of money paid in execution of the consideration moving from the promisee in a contract of loan; and we are doing so in the absence of the debtor, the other party to the contract. It is an extended application of the principle, but the principle is the same. If it was unfair or unjust for the debtor to receive the consideration for

(1) L. R. 9 Ch. 609.

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a promise to be executed by him, I think the obligation upon the officer of the Court to return such consideration when it comes into his hands must exist.

I think that the appeal should be allowed and the Official Receiver should be directed to repay to the applicant the sum of 764*l.* 0*s.* 5*d.* with costs here.

Appeal allowed.

Solicitors for appellant: *Smith, Rundell, Dods & Bockett.*
Solicitor for respondent: *Solicitor to Board of Trade.*

W. I. C.

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COMMISSIONERS OF INLAND REVENUE *v.* GITTUS.

Revenue—Excess Profits Duty—Set Off—Loss in Business during previous accounting Period—Change in Ownership of Business during that Period—Extent of Set Off—Finance (No. 2) Act, 1915 (5 & 6 *Geo.* 5, *c.* 89), *s.* 38, *sub-s.* 3; *s.* 40, *sub-ss.* 1, 2; *Fourth Sched., Part II., r.* 5.

The Finance (No. 2) Act, 1915, Part III., contains, among other provisions, s. 38, sub-s. 3, which provides that: "Where a person proves that in any accounting period, which ended after the fourth day of August, nineteen hundred and fourteen . . . . he has sustained a loss in his trade or business, he shall be entitled . . . . to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period."

The Fourth Sched., Part II., is entitled: "Pre-War Standard," and rule 5 thereunder is as follows: "Where since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this part of this Schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this Schedule should apply as if the trade or business had not changed ownership. . . . ."

In an accounting period and at a time coming respectively within the above provisions a loss had been sustained in a business, and the business had also changed ownership, the respondent having become its owner. An application was made under the above r. 5 that Part III. of the Act should apply as if the business had not changed ownership. As against the excess profits duty payable by the respondent in respect of the succeeding accounting period it was admitted that he was entitled

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under s. 38, sub-s. 3, to set off the proportion of the loss applicable to that part of the accounting period in which the loss occurred during which he was himself the owner of the business; but he claimed to be entitled to set off also the proportion of the loss applicable to the part of the period during which his predecessor was the owner:—

Held, that the respondent was not entitled under s. 38, sub-s. 3, to set off against the duty the proportion of the loss applicable to the time of his predecessor's ownership of the business, first, because that sub-section, assuming that its operation was not affected by the application under rule 5, only entitled a person to set off a loss in his business which was personal to himself; and, secondly, because that sub-section, although included in Part III. of the Act, was not by virtue of the application under rule 5 in regard to that part of the Act made to apply as if the business had not changed ownership, so as to entitle the respondent to set off that proportion of the loss, inasmuch as the only provisions of that part of the Act which an application under r. 5 caused so to apply were those which related to the pre-war standard, and the sub-section in question was not one of these provisions.

CASE stated by Commissioners for the General Purposes of the Income Tax Acts for the division of Staincross, in the county of York.

For many years before 1915 Mark William Gittus carried on the business of a wagon builder at Penistone, and his son W. B. Gittus, hereinafter called "the respondent," was employed by him to assist him in the business at a salary, but was not a partner in the business. Mark W. Gittus, by his will, after certain specific gifts of real property, devised and bequeathed all the residue of his real estate and all his personal estate, subject to payment of his debts and funeral and testamentary expenses, to the respondent. Mark W. Gittus died on September 6, 1915, and the respondent thereupon continued to carry on the same business on his own account, without any break or interruption, under the name of William Gittus & Son.

During the accounting period from October 1, 1914, to September 30, 1915, the business suffered a loss, making a deficiency as compared with the pre-war standard of profits of 1543*l.* 6*s.*, of which sum 142*l.* 16*s.* was the proportion applicable to the period from September 6, 1915, to September 30, 1915, the balance of 1400*l.* 10*s.* being the proportion applicable to the period from October 1, 1914, to September 6, 1915.

The Commissioners of Inland Revenue, hereinafter called

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"the appellants," made an assessment upon the respondent for excess profits duty under the Finance (No. 2) Act, 1915, for the accounting period from October 1, 1915, to September 30, 1916. In so doing they found that the net amount of the excess profits of the business in that period was 707*l.*, and that the excess profits duty of an amount equal to 60 per cent. of these excess profits would be 424*l.* 4*s.*; as against that amount of duty they allowed, under s. 38, sub-s. 3, and Fourth Sched., Part II., r. 5 of the Act, a set off of the above-mentioned sum of 142*l.* 16*s.*, but not of the above-mentioned balance of 1400*l.* 10*s.*; and they accordingly charged the respondent in respect of excess profits duty under the Act with 281*l.* 8*s.*, being the aforesaid 424*l.* 4*s.* less the aforesaid 142*l.* 16*s.* set off against it.

The assessment was made upon the respondent as: "William Gittus & Son, W. B. Gittus (sole)," and its amount was set forth as follows:—

Net amount of Excess Profits.	Rate.	Assessed.	Set Off.	Payable.
£707	60%	£424 4*s.* 0*d.*	£142 16*s.* 0*d.*	£281 8*s.* 0*d.*

If the respondent was entitled to set off against the amount assessed the above-mentioned balance of 1400*l.* 10*s.* also, he would have been entirely relieved from excess profits duty for the last-mentioned accounting period.

The respondent appealed against the assessment to the General Commissioners for the Division.

On November 22, 1917, on the hearing of the appeal, the above-mentioned facts were proved or admitted, and the General Commissioners then decided that there had been a change of ownership in the business, and that Part III. of the Act of 1915 (1) and the Fourth Sched. (1) thereto should apply

(1) Finance (No. 2) Act, 1915.

"PART III.

"EXCESS PROFITS DUTY."

Sect. 38 "(1.) There shall be charged, levied, and paid on the amount by which the profits arising from any trade or business to which this part of this Act applies, in any accounting period which ended after the fourth day of August, nineteen hundred and fourteen, and before the first day of July, nineteen hundred and fifteen, exceeded, by more than two hundred pounds, the pre-war

as if the business had not changed ownership in accordance with the Fourth Sched., Part II., r. 5 (1), and that the amount of the assessment on that basis, if not agreed on by the parties, should be determined by the General Commissioners at a subsequent meeting.

On March 7, 1918, the parties having failed to agree as to

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standard of profits as defined for the purposes of this part of this Act, a duty (in this Act referred to as 'excess profits duty') of an amount equal to fifty per cent. of that excess.

. . . . . .

"(3.) Where a person proves that in any accounting period, which ended after the fourth day of August, nineteen hundred and fourteen, his profits have not reached the point which involves liability to excess profits duty, or that he has sustained a loss in his trade or business, he shall be entitled to repayment of such amount paid by him as excess profits duty in respect of any previous accounting period, or to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period."

Sect. 40: "(1.) The profits arising from any trade or business to which this part of this Act applies shall be separately determined for the purpose of this Part of this Act, but shall be so determined on the same principles as the profits and gains of the trade or business are or would be determined for the purpose of income tax, subject to the modifications set out in the First Part of the Fourth Schedule to this Act and to any other provisions of this Act.

"(2.) . . . . The provisions contained in the Second Part of the Fourth Schedule to this Act shall have effect with respect to the computation of the profits of a pre-war trade year, and the provisions contained in the Third Part of the Fourth Schedule shall have effect with respect to the ascertainment of capital for the purposes of this Part of this Act. . . . ."

FOURTH SCHEDULE.

"PART I.

"COMPUTATION OF PROFITS.

. . . . . .

"PART II.

"PRE-WAR STANDARD.

. . . . . .

"(5.) Where since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this Part of this Schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this Schedule should apply as if the trade or business had not changed ownership, but in that case such modifications (if any) shall be made in the application of this Schedule as may be necessary to make the basis on which the profits standard is computed the same as that on which the profits of the accounting period are computed."

"PART III.

"CAPITAL.

. . . . . ."

(1) Note (1) p. 768 above.

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the amount, the case again came before the General Commissioners, when it was admitted that it should be decided by them on the footing that, in so far as provided for in the Fourth Sched., Part II., r. 5, of the Act of 1915 (1), the provisions of Part III. of that Act (1) and the Fourth Sched. thereof should apply as if the trade or business had not changed ownership.

It was contended on behalf of the respondent that the relief granted by s. 38, sub-s. 3, and the Fourth Sched., Part II., r. 5 (1), applied to the business, and that he was entitled to set off the loss suffered by his predecessor.

It was contended on behalf of the appellants that the relief granted by s. 38, sub-s. 3, applied only to the person suffering the deficiency or loss, and that no part of the deficiency above mentioned applicable to the period from October 1, 1914, to September 6, 1915, could be used by the respondent to obtain relief under that section in respect of the accounting period October 1, 1915, to September 30, 1916, and, further, that r. 5 only had reference to the pre-war standard.

The General Commissioners decided in favour of the respondent, holding that he was entitled to set off the deficiency or loss applicable to the period from October 1, 1914, to September 6, 1915, against any liability for excess profits duty for the accounting period October 1, 1915, to September 30, 1916, and they discharged the assessment.

On the present appeal the only question for the Court was that raised by the contentions of the parties—namely, whether the relief under s. 38, sub-s. 3 (1), and Fourth Sched., Part II., r. 5, applied to the business or was confined to the person suffering the loss.

Sir Gordon Hewart A.-G. and *T. H. Parr* for the Commissioners of Inland Revenue, appellants. The respondent is admittedly entitled to set off against the amount of the excess profits duty assessed upon him so much of the loss that occurred during the previous accounting period as is applicable to the part of that period during which he was the owner of the business.

(1) Note (1) p. 768 above.

The respondent is not, however, entitled to set off the proportion of the loss that is applicable to the earlier part of that period during which his predecessor was owner of the business.

The Finance (No. 2) Act, 1915, s. 38, sub-s. 3, no doubt provides that where a person proves that in any accounting period which ended after August 4, 1914, he has sustained a loss in his trade or business, he shall be entitled to set off the loss against any excess profits duty payable by him in respect of any succeeding accounting period to the extent therein mentioned. That sub-section, however, on its true construction, assuming that it is not extended by the Fourth Sched., Part II., r. 5, only entitles the owner of the business to set off against his excess profits duty a loss in the business which is personal to himself. Consequently that sub-section only entitles the respondent to set off so much of the loss as is applicable to the time when he was the owner of the business.

The operation of s. 38, sub-s. 3, is not affected by the Fourth Sched., Part II., r. 5. That rule no doubt provides that where since the commencement of the three last pre-war trade years a trade or business has changed ownership, that part of the schedule shall apply as if a new trade or business had been commenced on the change of ownership, except in cases where the tax-payer makes an application that Part III. of the Act and that schedule should apply as if the trade or business had not changed ownership. Part II. of the Fourth Sched., however, in which that rule is comprised, as appears both from its heading and from its whole tenor applies only to the pre-war standard of profits, and to no other matter. Therefore, where under that rule the taxpayer makes an application that Part III. of the Act, which includes ss. 38 to 45, both inclusive, and the Fourth Sched., shall apply as if a business which has in fact changed ownership had not done so, the provisions of that part of the Act are made to apply only in so far as they relate to the pre-war standard of profits and no further. Thus, for example, s. 40, sub-s. 2, which provides for the determination of the pre-war standard, would clearly be made to apply as if the business had not changed ownership.

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See Dowell on Income Tax, 7th ed., p. 955. On the other hand, s. 38, sub-s. 3, which does not relate to the pre-war standard, would not be made to apply as if the business had not changed ownership. Accordingly, where in an accounting period a business has changed ownership under the Fourth Sched., Part II., r. 5, and in that period it has also sustained a loss, even though the owner makes an application under that rule that Part III. of the Act should apply as if the business had not changed ownership, that application will have no effect upon s. 38, sub-s. 3, and the owner will not be entitled to treat that sub-section as applying as if the business had not changed ownership, but had continued to be one and the same business, and to set off the whole of the loss against his excess profits duty of the succeeding accounting period. He will have to proceed on the footing that a new business commenced on the change of ownership, and will only be entitled to set off so much of the loss in the previous accounting period as is applicable to the part of that period during which he was owner of the business. In the present case, therefore, although an application was made under r. 5, that Part III. of the Act should apply as if the business had not changed ownership, that application had not the effect of extending s. 38, sub-s. 3, and the appellant is not entitled to treat the business as not having changed ownership, so as to enable him to set off the whole of the loss in question against his excess profits duty, but must proceed as though a new business commenced on the change of ownership and is only entitled to set off so much of the loss as is applicable to the time of his own ownership.

A. M. Latter for the respondent. The respondent is entitled to set off against the excess profits duty for the accounting period in respect of which he has been charged, not only the proportion of the loss suffered by the business in the preceding accounting period which is applicable to the part of that period during which he was the owner of the business, but also the proportion which is applicable to the earlier part of that period during which his predecessor was the owner.

The Act of 1915, s. 38, sub-s. 3, which provides that where a person proves that in any accounting period there referred to

he has sustained a loss in his business he shall be entitled to set it off against any excess profits duty payable by him in respect of any succeeding accounting period, is not limited to a loss merely personal to the individual charged with the duty, but extends to any loss connected with the business. Throughout Part III. of the Act, which relates to excess profits duty, that duty is treated as being assessed not upon persons but upon trades and businesses. Thus s. 38, sub-s. 1, provides that the duty shall be charged, levied and paid on the amount by which the profits arising from any "trade or business" to which that part of the Act applies, in any accounting period there referred to, exceed the figure there indicated. Sect. 39 provides that the "trades and businesses" to which that part of the Act applies are those there described. Sect. 40, sub-s. 1, provides that the profits from any "trade or business" to which that part of the Act applies, shall be determined for the purposes of that part of the Act as therein mentioned, subject to the modifications in the Fourth Sched., Part I., which relates to the computation of profits for the purposes of the duty. Sect. 40, sub-s. 2, provides that the pre-war standard of profits for the purposes of that part of the Act shall be the amount of the profits from the "trade or business" on the average of the years there mentioned. As the profits upon which the duty is charged are those of the trade or business and not of the individual, it must be supposed that the losses to be set off against the duty are also those of the trade or business and not of the individual.

It is true that the Commissioners in assessing the excess profits duty have to lay their hands upon some person who may be charged therewith. Sect. 45, sub-s. 2, provides that the duty may be assessed on any "person" owning or carrying on the trade or business, or acting as agent for that person in so doing. And s. 38, sub-s. 3, requires that a "person" should prove that his profits have not reached the point of liability or that he has sustained a loss in his business, in order to entitle him to repayment of duty or to a set off. In these provisions, however, the word "person" does not mean an individual. By the Interpretation Act, 1889 (52 & 53

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Vict. c. 63), s. 19, it is provided that the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporate. Where a company sold its business to a new company consisting in part of the same shareholders it was held that the new company was entitled under s.26, sub-s. 3, of the Finance Act, 1907, to deduct from its profits chargeable with income tax the balance of deductions for wear and tear which would have been allowable to the old company: *Scottish Shire Line, Ld.* v. *Lethem* (1), Lord Salvesen observing that the argument to the contrary on behalf of the surveyor of taxes would result in this, that an entirely immaterial change in a partnership, either by the death of an existing partner, however small his interest, or by the assumption of a new partner, who was entitled to a share of the profits however fractional, would deprive the remaining partners of the benefit of a deduction to which they were otherwise entitled; and that he could not imagine that the Legislature had that in view. (2) [Reference was also made to *Inland Revenue Commissioners* v. *Maxse*. (3)] Similarly, in a case like the present, if the owner of the business was a partnership, a company, or a body of trustees, it could not be said that because a slight change had taken place in the constitution of the owner during the accounting period in which the loss was sustained, the owner was not entitled, under s. 38, sub-s. 3, of the Act of 1915, to set off the proportion of the loss that had occurred before the change took place against the duty payable in respect of the succeeding accounting period. In order to entitle the person by whom the duty is payable to a set off under that sub-section it cannot therefore be essential that he should be the same person by whom the loss has been sustained.

Secondly, even if on the true construction of s. 38, sub-s. 3, when taken apart and by itself, a person in whose business during an accounting period a loss had occurred could only set off the proportion of the loss which he had personally

(1) 1912 S. C. 1108; 6 Tax Cas. 91.

(2) 1912 S. C. 1115; 6 Tax Cas. 99.

(3) [1919] 1 K. B. 647.

sustained as against the duty assessed upon him in respect of a succeeding accounting period, yet when during the period in which the loss occurred the business has changed ownership under Fourth Sched., Part II., r. 5, and an application has been made under that rule that Part III. of the Act should apply as if the business had not changed ownership, the result is to extend the operation of s. 38, sub-s. 3, and to make it apply as if the ownership had been continuous so as to enable the owner of the business to set off not only the proportion of the loss which he has personally sustained, but also the proportion which occurred during the ownership of his predecessor. Therefore, even on that narrower construction of s. 38, sub-s. 3, the respondent is entitled to set off as against the excess profits duty assessed upon him, the whole of the loss in question.

T. H. Parr replied.

ROWLATT J. In this case I am of opinion that the Crown is entitled to judgment. The respondent succeeded his father in the ownership of the business on September 6, 1915. During the accounting period from October 1, 1914, to October 1, 1915, the business suffered a loss, making a deficiency as compared with the pre-war standard of profits, and the loss was thus applicable to the first three weeks or so of the respondent's ownership of the business. As against the excess profits duty payable by the respondent under the Finance (No. 2) Act, 1915, in respect of the succeeding accounting period, it is admitted by the Crown that the respondent is entitled under s. 38, sub-s. 3, of the Act to set off the proportion of the loss which was applicable to that part of the accounting period in which the loss occurred during which he was himself the owner of the business, but it is denied by the Crown that he is entitled to set off the proportion of the loss applicable to the forty-nine weeks or thereabouts of that accounting period during which his father carried on the business. The General Commissioners have held that the respondent is entitled to set off the latter proportion of the loss also, and the Crown has appealed against their decision.

It is provided by s. 38, sub-s. 3, of the Act as follows:

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"Where a person proves that in any accounting period, which ended" after the date there mentioned, "he has sustained a loss in his trade or business, he shall be entitled . . . . to set off against any excess profits duty payable by him in respect of any succeeding accounting period, such an amount as will make the total amount of excess profits duty paid by him during the whole period accord with his profits or losses during that period," that is to say during the aggregate of the accounting periods. Taking that section alone, I think it clearly points to the case of an individual, and means that the loss in his business which a person shall be entitled to set off against the excess profits duty payable by him is a loss personal to himself. It is true that in a sense the excess profits duty is assessed upon a trade or business, a trade or business being the subject-matter in respect of which it is charged. The duty must, however, be assessed upon a person, and where, as in the present case, it appears that during the accounting period in which a loss has been sustained in the business the person assessed has become the person owning or carrying on the business or the agent for that person, it seems to me that the sub-section in question according to its true meaning distinctly provides that he is to be entitled to set off as against the duty payable by him in a succeeding year only so much of the loss as has been sustained by him as an individual, and no more. If s. 38, sub-s. 3, alone required to be dealt with, it seems to me that the case would not present much difficulty.

It is necessary, however, to consider further whether s. 38, sub-s. 3, is not altered by the Fourth Sched., Part II., r. 5. That schedule is incorporated into the scheme of the legislation by s. 40. By sub-s. 1 of that section it is declared that the determination of profits for the purpose of excess profits duty is to be subject to the Fourth Sched., Part I., and by sub-s. 2 of that section it is provided that the Fourth Sched., Part II., is to have effect with respect to the profits of a pre-war trade year, and the Fourth Sched., Part III., with respect to the ascertainment of capital, for the purposes of the excess profits duty. These parts of the Fourth Schedule are entitled respectively: "Part I. Computation of Profits," "Part II.

Pre-War Standard," and "Part III. Capital." One would therefore expect to find that the Fourth Sched., Part II., was dealing only with the determination of the pre-war standard, and that it had nothing whatever to do with the special right given by s. 38, sub-s. 3, to a person who, in an accounting period ending after the war began, has sustained a loss in his business, of setting off his loss against his excess profits duty in a succeeding accounting period, that being a subject of a wholly different kind. When one comes to r. 5 of that part of the schedule, however, one certainly finds language which is remarkable and which causes one some difficulty. That rule provides as follows: "Where since the commencement of the three last pre-war trade years a trade or business has changed ownership, the provisions of this part of this schedule shall apply as if a new trade or business had been commenced on the change of ownership, except" in cases where a certain step is taken. The rule says nothing as to what is to take place when the exception arises beyond stating in effect that where the exception arises the provisions of that part of the schedule shall not apply as if a new trade or business had been commenced on the change of ownership. Involved in the terms in which the exception is expressed there seems, however, to be something more. The exception is as follows: "except in cases when the taxpayer makes an application that the provisions of Part III. of this Act and this schedule should apply as if the trade or business had not changed ownership." It thus looks as if the exception implies that when the taxpayer makes the application the result is to be not merely that the earlier part of the rule is not to apply, but that the provisions of Part III. of the Act and that schedule are to apply as if the trade or business had not changed ownership. Counsel for the respondent accordingly contends that Part III. of the Act is to apply as if there had been no change of ownership, but as if the respondent and his predecessor had been one and the same owner, and, as Part III. of the Act includes s. 38, sub-s. 3, that the respondent is therefore entitled to set off against his excess profits duty not only the part of the loss in question

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which is applicable to the time of his own ownership, but also the part of it which is applicable to the ownership of his predecessor. I think that that is a contention which takes Part II. of the Fourth Sched. outside of the region in which it is intended to operate. It seems to me that r. 5, in saying that the provisions of Part III. of the Act and that schedule shall apply as if the trade or business had not changed ownership must mean that these provisions are to apply as if the trade or business had not changed ownership only to the subject-matter of Part II. of the schedule, that is, to the pre-war standard, and to no other subject- matter, and, therefore, that s. 38, sub-s. 3, does not operate in the present case.

For these reasons I think that this appeal must be allowed with costs.

Appeal allowed.

Solicitor for appellants: *Solicitor of Inland Revenue.*
Solicitor for respondent: *Norman P. Hart.*

J. R.

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Feb. 19, 20.

[IN THE COURT OF APPEAL.]

PETER DIXON & SONS, LIMITED *v.* HENDERSON, CRAIG & CO., LIMITED.

Contract—Sale of Goods—Suspensory Clause—Delivery "prevented or hindered" by War—Difficulty of Shipping—Force majeure—Right of Sellers to suspend Delivery.

A contract, dated in 1911, for the sale of wood pulp, to be delivered in quantities of 5000 tons a year, extending to 1917, provided, by a clause headed "Force majeure," that delivery under the contract might be suspended pending any contingency beyond the control of the parties which "prevents or hinders . . . . delivery . . . . namely, Act of God, War," etc. The sellers duly made deliveries under the contract until the commencement of the war, when considerable difficulty arose in carrying out the contract. British ships were no longer available for the trade, although foreign shipping could be obtained at increased freights, Admiralty regulations lengthened the voyages, and there was liability to capture by the enemy or loss through mines or submarines, and delay through detention by British or Allied warships. The sellers

having failed to deliver the pulp the buyers bought it in against the sellers at an increased price, and claimed to recover the difference :—

Held, that the case involved not merely the question of a rise in price, but the position had been so changed by the war that the sellers although not "prevented" were "hindered" from carrying out the contract within the meaning of the force majeure clause, and were therefore entitled to suspend delivery.

Decision of Bailhache J. reversed.

Tennants, Ld. v. *Wilson & Co.* [1917] A. C. 495 applied.

APPEAL from a decision of Bailhache J. on a special case stated by arbitrators. It arose upon a contract between Peter Dixon & Sons, Ld., and Henderson, Craig & Co., Ld., for the sale of a large quantity of wood pulp. The buyers claimed that in respect of the four months January to April, 1915, there was no delivery as required by the contract, and they bought the pulp in against the sellers, and claimed in the arbitration the difference in price. The arbitrators stated a case for the opinion of the judge, who found, contrary to the view expressed by the arbitrators, that the sellers were liable. From his judgment the sellers appealed.

The facts as stated by Swinfen Eady M.R. in his judgment were as follows :—

The contract, made on December 28, 1911, was for the sale of 30,000 tons of moist wood pulp of a particular specification to be delivered in quantities of about 5000 tons a year, spread over the year in the manner provided by the contract, and extending up to the year 1917. The contract contained a provision headed "Force majeure," in the following terms : "The buyers or sellers may suspend deliveries under this contract pending any contingency beyond their control which prevents or hinders the manufacture of paper or the manufacture or delivery of pulp, namely, Act of God, War," and so on. The contract was at the price of 45*s.* 6*d.* a ton c.i.f. Grimsby. The sellers duly made deliveries from the date of the contract until the commencement of the war. No complaint of short delivery was made until then. The contract was made upon a printed form primarily applicable to contracts between pulp manufacturers and paper manufacturers. The clause with reference to force majeure provided

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that "if the works of the seller or the buyer are so destroyed as to render them incapable of manufacturing pulp or paper," that was to say, if the buyers' paper works or the sellers' pulp works were destroyed. Although the form of contract as settled was between manufacturers, it was applicable, mutatis mutandis, to merchants, and the sellers in this case were merchants. Having entered into this contract, on January 5, 1912, the sellers made another with Becker & Co., Ld., from whom they contracted to buy a similar quantity of pulp. Their contract to purchase was in identical terms, except as to price, with the contract of December 28, 1911. On the outbreak of war, the sellers gave notice that the war prevented or hindered them carrying out the contract. The arbitrators found that "up to and including the month of August, 1914," when war broke out, "the respondents, the sellers, made regular deliveries under the contract with the claimants, and the pulp so delivered had been procured from Messrs. Becker & Co. under the contract of January 5, 1912. By reason of the difficulties created by the war the claimants and respondents came to an arrangement under which the respondents delivered against the said contract two parcels of Canadian pulp on October 3 and December 10, 1914, respectively, amounting together to 1272 tons or thereabouts, and the claimants paid in respect thereof an additional sum beyond the contract price in respect of extra freight and insurance charges incurred in the carriage of the Canadian pulp. The said Canadian pulp was supplied by Becker & Co., Ld., to the respondents, and if was at Messrs. Becker & Co.'s instance that the respondents entered into the said arrangement with the claimants." So that in respect of the deliveries for the rest of 1914 the buyers in this manner acceded to the position taken up by the sellers, that, to obtain delivery, extra freight and extra charges must be paid; in other words, they must have a fresh contract. They were prevented or hindered from delivering under their contract, and if the buyers required delivery a fresh contract had to be made. That settled the matter down to the end of 1914, subject to this; at that time

there was an over delivery by the sellers to the buyers of sixty-eight tons, for which they were entitled to credit in the next year, and credit must be given for that in the damages which the buyers claimed. Then the claim was in respect of the next four months, January to April, 1915, and the sellers contended that in respect of that period they had been prevented or hindered by war, which was a contingency beyond their control.

The arbitrators dealt with the facts with regard to that. They said that there were difficulties which with regard to it "were so far generally recognized by the trade that importers (including the claimants) of pulp into the United Kingdom, in relation to pre-war contracts on c.i.f. terms, and in the form of the contract between the claimants and respondents, only obtained their deliveries during the period in question by agreeing to pay the extra freights demanded." That was to say: the trade regarded pulp contracts as being hindered or prevented, and entered into fresh arrangements in order to obtain deliveries. So again as to contracts that were not c.i.f. but f.o.b. Buyers having bought under f.o.b. contracts, including the claimants, claimed the protection of the force majeure clause, and took up the position that they were not bound to provide ships to take delivery under their contracts; that was to say, they were not bound to supply the tonnage, and that position was taken up by the claimants themselves. The sellers had bought from Beckers, and in the points of claim and defence which were exchanged under the direction of the arbitrators, which were referred to in the award, and treated as part of the special case, the defendants alleged what Beckers' arrangements were for shipping pulp. The defendants alleged that Beckers had five ships; two were their own and three were chartered by them. They alleged that both Beckers' own ships became unavailable; one became a total loss at sea; the other, at the outbreak of war, had been sent to Gefle on August 4, and was interned. They further alleged that they had three time charters, and they stated how the charters in respect of these ships came to an end. So that none of Beckers' ships was available. The arbitrators

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found as to those allegations, as follows: "Becker & Co. are large importers of pulp into the United Kingdom, and they, before the war, for the purpose of carrying on their trade had made standing arrangements for the carriage of their pulp to the United Kingdom. They were owners of, or entitled under charter to the use of certain ships which in themselves were sufficient to enable Becker & Co. to fulfil their obligations for the delivery of pulp. By reason of circumstances arising from the war, these shipping facilities were not available during the months January to April, 1915, and in consequence Becker & Co., for the purpose of delivering their pulp, from time to time entered into special arrangements under the conditions and at the higher freights before mentioned." In other words, the effect of the war upon Beckers' shipping facilities was such that they could no longer ship pulp by their vessels, and they had to make fresh arrangements at higher terms. They in turn took advantage of the clause against sellers, and declined to deliver to sellers except in pursuance of a fresh arrangement. It appears also from the award that British ships, speaking generally, were no longer available for this particular trade. "During the period January to April, 1915, it was always possible by making special arrangements as aforesaid to obtain Scandinavian ships to lift and carry pulp." British ships were no longer available; conditions had changed; voyages were longer, by reason of Admiralty instructions given to ships; the risk was greater; there was, in addition to ordinary war risks, risk of delay from detention by British or Allied ships, and, therefore, Beckers took advantage of the condition in their contracts, and declined to deliver under those contracts, although they were open to make fresh arrangements on new terms.

Leslie Scott K.C., *Greer K.C.* and *A. Neilson* for the appellants.

Bailhache J. postponed giving judgment in this case until after the decision of the House of Lords in *Tennants, Ld.* v. *Wilson & Co.* (1) It is submitted that having regard

(1) [1917] A. C. 495.

to that decision he came to a wrong conclusion in the present case. Apart from the question of increased cost of freight the evidence showed a clear hindrance of delivery within the contract. The shortage of shipping and other consequences of the war "hindered" delivery, even if it did not "prevent" it. Bailhache J. did not give sufficient weight to the distinction between "preventing" and "hindering." The rise in freights did not constitute the difficulty, but was a measure of it. Delivery was not impossible having regard to the fact that it was possible to have obtained Scandinavian shipping, but it was "hindered" within the meaning of the contract. There was ample evidence before the arbitrators to justify the conclusion to which they came.

Leck K.C. and *Raeburn* for the respondents.

In *Tennants, Ld.* v. *Wilson & Co.* (1), there was a shortage of supply. Here there was no prevention if the higher rate of freight had been paid. In the case of a c.i.f. contract a rise in freight does not amount to a hindrance to the seller. Sellers were under the obligation of paying the ruling rate of freights at the time when delivery was required to be made. The facts bring this case within the principle established in *Tennants, Ld.* v. *Wilson & Co.* (1) It is true that on the facts there the House of Lords came to the conclusion that the shortage of supply was a hindrance, and excused the defendants from performance of the contract on that ground, but the principle of the decision of the Court of Appeal (2) was not affected.

Commercial impossibility of performance of the contract received its deathblow in the House of Lords. Here sellers have been hindered, not from delivering the pulp, but from delivering it at the expected profit. On the facts of this case there was no evidence of "hindrance" within the meaning of the contract.

[They also referred to *Avery* v. *Bowden.* (3)]

SWINFEN EADY M.R. (after stating the facts as above

(1) [1917] A. C. 495. (2) [1917] 1 K. B. 208.
(3) (1856) 26 L. J. (Q. B.) 3.

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set out). Under the circumstances, can it be said that the sellers were not "hindered or prevented" within the meaning of the contract? It is not a question of price, merely an increase of freight. Tonnage had to be obtained to bring the pulp in Scandinavian ships, and although the difficulty in obtaining tonnage may be reflected in the increase of freight, it was not a mere matter of increase of freight; if so, there were standing contracts that ought to have been fulfilled. Counsel for the respondents urged that certain shipowners, for reasons of their own, chose not to fulfil standing contracts. It was not only shipowners but pulp buyers and sellers. The whole trade was dislocated, by reason of the difficulty that had arisen in tonnage. It seems to me that the language of Lord Dunedin in *Tennants, Ld.* v. *Wilson & Co.* (1) is applicable to the present case: "Where I think, with deference to the learned judges, the majority of the Court below have gone wrong is that they have seemingly assumed that price was the only drawback. I do not think that price as price has anything to do with it. Price may be evidence, but it is only one of many kinds of evidence as to shortage. If the appellants had alleged nothing but advanced price they would have failed. But they have shown much more." That is exactly so here. Price, as price only, would not have affected it. They were all standing contracts, but the position has so changed by reason of the war that buyers and sellers and the whole trade were hindered or prevented from carrying out those contracts.

The arbitrators say: "On the facts aforesaid, we are of opinion that even if the respondents were not prevented from making delivery of the pulp, nevertheless they were, during the months in question, hindered in the delivery of such pulp by reason of the war, and that they were in consequence entitled, under condition 3 of the said contract, to suspend deliveries during the said months." And they find that the sellers are not under any liability to the buyers in respect of the transaction. Then they state the question for the opinion of the Court, and whichever way it is looked

(1) [1917] A. C. 495, 516.

at I think in substance the question is this: Having regard to the facts as set out in the award, was there evidence upon which the arbitrators as reasonable men could come to the conclusion at which in fact they arrived? Having regard to the general dislocation of trade, to the need for entering into fresh contracts to obtain tonnage, to the fact that all standing contracts by all parties in the trade were no longer able to be carried out, I am of opinion that upon these facts much more than merely an increase in price was proved, and it is no answer to say to the sellers: "It was possible to carry out your contract and you could have got rid of the obstacle or difficulty by obtaining tonnage at an increased price, or by paying Beckers an increased sum for them to supply you." In my judgment there was ample evidence before the arbitrators on which they could arrive at the conclusion, at which they did in fact arrive, that the sellers were hindered in the delivery of the pulp within the meaning of the contract.

That being so, I am of opinion that the judgment below ought to be reversed, and the award ought to be in favour of the sellers.

BANKES L.J. I agree. In the first place what is the question submitted for the opinion of the Court by the arbitrators? When one bears in mind that it is only competent to the arbitrators to state a question of law for the opinion of the Court it seems to me that the question they submitted is really only capable of one construction, and that is whether there was evidence before them which justified them in coming to the conclusion at which they arrived. An attempt has been made to suggest that that reading of the question is not open to the appellants in this Court because of what happened in the Court below. We are now fully informed of what did happen, and it is plain that counsel for the respondents and his clients realized that there must be a difficulty. Of course it was not necessary for him to create difficulties for himself, but fortunately for him the attention of the learned judge below was not called

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in any pointed way to the form of the question, or the real matter submitted to his decision. I say fortunately because, having regard to the terms of the judgment, if he had read the question in the same way as this Court reads it, I venture to say his decision would not have been the one he ultimately gave. Be that as it may in my opinion there is no doubt whatever about the form of the question that is submitted to us.

The next matter for consideration is: How far does the case of *Tennants, Ld.* v. *Wilson & Co.* (1) lay down any rules of law which it is necessary to observe in coming to a conclusion on the question that is submitted to us? I think two rules were certainly laid down in that case. One was that a rise in price would not in itself constitute a hindrance to delivery within the meaning of such a contract as this; and I think the second rule may be gathered from the language of Lord Dunedin, where, in speaking of the judgment of Neville J., he says (2) that the learned judge read the word "hinder" "in the general sense of in any way affecting to an appreciable extent the ease of the usual way of supplying the article. . . . ." I think also you find in the speeches, both of Lord Atkinson and Lord Loreburn, a definition of what constitutes a difficulty within the meaning of this contract. Lord Loreburn says this (3): "By 'hindering' delivery is meant interposing obstacles which it would be really difficult to overcome." Lord Atkinson says (4): "'Preventing' delivery means, in my view, rendering delivery impossible; and 'hindering' delivery means something less than this, namely, rendering delivery more or less difficult, but not impossible." With the assistance derived from that case I think it is right to say that in considering this award one must exclude all the evidence from which the only inference that could be drawn would lead to one or other of what I may call the prohibited conclusions—namely, a conclusion derived from a mere rise in price or the conclusion which was taken by Neville J.

Now it is said by counsel for the respondents that there

(1) [1917] A. C. 495.
(2) [1917] A. C. 513.
(3) [1917] A. C. 510.
(4) [1917] A. C. 518.

is no evidence in this case beyond that of a mere rise in price. I do not agree with that at all. It seems to me manifest that there may be cases, or if you use the language of this particular contract, contingencies, which produce a rise in price, but which may themselves, quite independently of the consequential rise in price, create difficulties which hinder a trader in his trade, and I think that the arbitrators took that view in this case. If you look at the award you find this, and these are the findings of fact. "By reason of the requisition of ships by the British Government and other circumstances arising from the war British shipowners regularly supplying ships for the pulp trade withdrew their ships, so that traders were compelled to depend on Scandinavian owners for the carriage of pulp to the United Kingdom. The Admiralty regulations substantially increased the length of the voyages, and throughout the period there was always a liability to capture by the enemy or loss through mines or submarines, and there was always a liability to delay through detention by British or Allied warships." Then they go on to point out the consequences of these difficulties, and these difficulties operated on the freights. I need not refer to that for a moment, but what is more material, they say in fact that these difficulties produced this result, that the freight market—they refer to freights and arrangements for carriage in relation to pulp—was so disturbed "that, generally, standing contracts for carriage were determined or suspended." Then they went on to say that the difficulties were generally recognized, and I read this paragraph as pointing out what the difficulties were, and saying that they resulted in a rise in freight, and also in a complete dislocation of the pulp-carrying trade to this country from Norway. But it does not stop there. These particular importers covered themselves, not only as to the goods to be supplied, but also as to their conveyance from the place of production, by a contract with Messrs. Becker. The arbitrators go on to say that in their opinion these difficulties not only created the general dislocation of trade to which I have referred, but in particular, they created a complete dislocation of Messrs. Beckers'

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carrying arrangements for the delivery of these particular goods.

I ask myself is that evidence of a real hindrance of the delivery of these goods? It seems to me that there is but one answer to that question: that it is a real hindrance. It is said, "Oh, yes, it is all very well to say it is a real hindrance, but you could have got over that difficulty by making other arrangements; you did in some cases make other arrangements, and other people made other arrangements." But it appears to me that, when once the real hindrance is established, it is quite immaterial to suggest that the difficulty could have been overcome by paying this largely increased price; because the answer is this: The sellers were not prevented, because they could have made other arrangements; but they have established the fact that they were hindered, and it is no answer to say that they were not prevented, so long as they can say they have established the fact that they were hindered.

It seems to me that when the award of these arbitrators is looked into, there is abundant evidence to justify their coming to the conclusion at which they did arrive, and, that being the only question really submitted to the Court, the appeal ought to be allowed.

EVE J. I concur in the conclusion at which the arbitrators and this Court have arrived. If upon ordinary occasions I have three alternative means of reaching this building, and on a particular occasion I find that two of such means have been suddenly suspended, by reason of a sympathetic strike, or for some other cause, and the third is so overcrowded as to preclude my using it, I should say that those facts would amount to a hindrance of my arrival here; none the less so, if by reason of some gratuitous lift in a motor car I ultimately reach my destination. The analogy may not be exact but it indicates sufficiently the ground upon which my conclusion is based.

With regard to the argument pressed upon us that Messrs. Becker & Co., at the higher freights and under the

circumstances aforesaid, could have obtained ships and delivered the pulp required by the respondents, it must be borne in mind that the mere fact that there was a possibility of surmounting the hindrance does not do away with or remove the hindrance. If the hindrance is insurmountable then it becomes prevention, and no longer hindrance. I do not think that argument ought to prevail, and, in my opinion, the conclusion the learned judge came to is one to which we cannot adhere.

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Appeal allowed.

Solicitors for appellants: *Simmons & Simmons.*

Solicitors for respondents: *Peacock & Goddard, for Younge, Wilson & Co., Sheffield.*

G. A. S.

SAILING SHIP HOLT HILL COMPANY *v.* UNITED KINGDOM MARINE ASSOCIATION.

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[1918 S. 141.]

Insurance (Marine)—Increased Value Policy—Constructive total Loss—Provision that Cost of Repairs should exceed certain Amount—Substitution of named Amount for repaired Value of Vessel—Marine Insurance Act, 1906 (6 *Edw.* 7, *c.* 41), *s.* 60.

A ship was insured by the plaintiffs with underwriters by an increased value policy of marine insurance in the sum of 3000*l.* against total or constructive total loss by the usual perils of the sea. The policy contained the following clause: "No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80 per cent. of the value in the ordinary hull 'all risks' policy—say 12,500*l.*" The form of the policy provided for a valuation of the vessel, but this was left blank. The vessel was also insured with underwriters in the sum of 12,500*l.* by an ordinary hull "all risks" policy. The ship met with damage from perils insured against. The estimated cost of repairs exceeded 80 per cent. of 12,500—namely, 10,000*l.*—but was very much less than the repaired value of the ship, which was about 25,000*l.* The plaintiffs claimed under the increased value policy as for a constructive total loss of the ship:—

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Held, that the parties had not by the insertion of the clause in the policy substituted the agreed figure of 10,000*l.* for the repaired value of the ship, in ascertaining whether the ship was a constructive total loss, but that the vessel was to be deemed a constructive total loss if the cost of repairs exceeded the value of the ship when repaired with a proviso that the cost of repairs must amount to 80 per cent. of the value in the ordinary hull "all risks" policy.

ACTION tried before Rowlatt J. in the Commercial Court.

The plaintiffs insured their sailing ship *Holt Hill* with the defendants by a policy of marine insurance dated April 11, 1916, in the sum of 3000*l.*, against total or constructive total loss by the usual perils of the seas during the period from April 2, 1916, to February 20, 1917. The policy, which was an increased value policy, contained the following clause: "No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80 per cent. of the value in the ordinary hull 'all risks' policy—say, 12,500*l.*" The form of the policy provided for a valuation of the ship, but this was left blank.

The vessel had been insured by the plaintiffs with underwriters in an ordinary hull "all risks" policy in the sum of 12,500*l.*

In November, 1916, during the currency of the policy, the *Holt Hill*, while on a voyage from Nantes to the United States, met with heavy gales and became dismasted and leaking, and the damage she sustained was so serious that she was abandoned by her master and crew. She was afterwards salved and taken into port. A survey of the damage was made and estimates obtained for doing the necessary repairs, the estimated cost of repairing the damage caused by perils insured against being much in excess of 10,000*l.*

The plaintiffs, on February 24, 1917, gave to the defendant a notice of abandonment under the policy.

The plaintiffs subsequently sold the *Holt Hill* in her damaged condition, substantially unrepaired, for 15,500*l.* Her value when repaired was estimated to be about 25,000*l.*, which was very much more than the estimated cost of repairs.

The plaintiffs claimed to recover from the defendants the sum of 3000*l.* for a constructive total loss under the policy.

R. A. Wright K.C. and *A. T. Miller* for the plaintiffs. The policy was an unvalued policy and the defendants agreed that they would pay the plaintiffs on the policy for a constructive total loss if the *Holt Hill* should suffer damage by perils insured against, the cost of repairing which exceeded 80 per cent. of 12,500*l.*, which was the value in the ordinary hull "all risks" policy. As therefore the estimated cost of repairs exceeded 80 per cent. of 12,500*l.* the plaintiffs are entitled to claim as for a constructive total loss. The plaintiffs, in selling the wreck, acted as a prudent owner would have done, as it would have been impossible to effect repairs within a reasonable time, and they did not thereby withdraw or waive the notice of abandonment. It was contemplated that there would be nothing to abandon to the increased value underwriters as the hull underwriters would seize the res whatever it was worth. [*Roura & Forgas* v. *Townend* (1) and *Thames and Mersey Marine Insurance Co.* v. *British and Chilian Steamship Co.* (2) were cited.]

Leck K.C. and *Greaves Lord* for the defendants. It is provided in s. 60 of the Marine Insurance Act, 1906, that subject to any express provision in the policy there is a constructive total loss of a ship "where she is so damaged by a peril insured against that the cost of repairing the damage would exceed the value of the ship when repaired." It is not suggested in the present case that the cost of repairing the *Holt Hill* would exceed her value when repaired, and there is nothing in the policy to alter the ordinary law as to what amounts to a constructive total loss of a ship, therefore there has not been a constructive total loss of the *Holt Hill*. The clause in the increased value policy was merely inserted in order to exclude claims for a constructive total loss unless the estimated cost of repairs was equal to 80 per cent. of the value declared in the ordinary hull "all risks" policy, even although the value of the ship when repaired might be less than the cost of the repairs: see Arnould on Marine Insurance, § 1134.

(1) [1919] 1 K. B. 189. (2) [1915] 2 K. B. 214.

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The parties to the policy have not said that in all cases where the cost of repairs amounts to 80 per cent. of 12,500*l.* that there is to be a constructive total loss of the ship. If the parties had so intended they might have used the Institute Clause where it is expressly provided that the insured value shall be taken to be the repaired value in ascertaining whether the vessel is a constructive total loss. In order to recover as for a constructive total loss a notice of abandonment must be given within a reasonable time : Marine Insurance Act, 1906, s. 62. In the present case the notice was given too late, as the plaintiffs when they gave it were already in negotiation for the sale of the wreck, and therefore it was not a real abandonment.

R. A. Wright K.C. in reply. The clause in the policy, although expressed in the negative, necessarily however carries with it the implied meaning that if the cost of repairing the damage caused by perils insured against should amount to 80 per cent. of the value in the ordinary hull "all risks" policy, namely, 12,500*l.*—there should be a constructive total loss of the vessel—see *Leigh* v. *Lillie.* (1)

Cur adv. vult.

1919. March 31. ROWLATT J. read the following judgment. In this case the sailing ship *Holt Hill* was insured for 3000*l.* in an "increased value" policy to pay only in the event of a total or constructive total loss. The form of the policy provided for a valuation of the ship but this was left blank. The vessel had also been insured in an ordinary hull "all risks" policy for 12,500*l.*, and by the policy now in question it was provided as follows : "No vessel insured in this association shall be deemed to be a constructive total loss unless the cost of repairing the damage caused by perils insured against shall amount to 80 per cent. of the value in the ordinary hull 'all risks' policy, say 12,500*l.*"

The ship met with damage, was abandoned and salved. The cost of repairs was more than 10,000*l.*, which is 80 per cent. of 12,500*l.*, but the repaired value was something like 25,000*l.*,

(1) (1860) 30 L. J. (Ex.) 25.

which was far more than the cost of repairs. In fact the ship was sold for a considerable sum substantially unrepaired.

Upon these facts the assured seek to recover under this policy as for a constructive total loss because the cost of repairs, though not reaching the repaired value, exceeded 10,000*l*. This involves reading the clause, which is expressed to provide that the ship shall not be deemed to be a constructive total loss unless the cost of repairs exceeds 10,000*l*., as involving the stipulation that she shall be deemed to be a constructive total loss if the cost of repairs do exceed 10,000*l*. In other words, that 10,000*l*. is to be treated as substituted for the repaired value of the ship for the purpose of ascertaining whether there is a constructive total loss of the ship. This reading of the clause does great and manifest violence to the language, but if it can be collected from the general purport of the policy or from the nature of the transaction that such was the intention, it would be justifiable to extract the affirmative proposition out of the negative as contended for. It seems to me, however, that there is no reason whatever why the clause should not mean just what it says. If this is so the position is that the underwriters are to pay if the ship is a constructive total loss as defined by the general law now found in the Marine Insurance Act, 1906—namely, if the cost of repairs exceeds the value of the ship when repaired, with a proviso by way of guarding against overvaluation, that the cost of repairs amounts to 80 per cent. of the value in the "all risks" policy. In fact if this is what the parties intended I do not see what form of words they could have chosen better calculated to express that intention than those which they have used. On the other hand if they had desired to substitute the agreed figure of 10,000*l*. for the repaired value, the direct and plain language of the well-known Institute Clause was ready to hand as a precedent. There is no tradition of obscurity in defining the position in this respect. I do not know whether underwriters usually pay when the condition provided for in the clause is satisfied without agitating the question of the actual repaired value, but I cannot read the clause as compelling them to do so.

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This point disposes of the case, and I express no opinion upon any of the questions raised as to notice of abandonment.

Judgment for defendants.

Solicitors for plaintiffs: *Lightbound, Owen & Co.*

Solicitors for defendants: *Rawle, Johnstone & Co. for Weightman, Pedder & Co., Liverpool.*

R. F. S.

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April 9.

DUNLOP RUBBER COMPANY, LIMITED *v.* COMMISSIONERS OF INLAND REVENUE.

Revenue—Excess Profits Duty—Company owning whole of Capital of another Company—Companies "carrying on the same Trade or Business"—Company manufacturing Rubber Goods—Companies producing raw Rubber—Finance (No. 2) Act, 1915 (5 *& 6 Geo. 5, c.* 89), *Fourth Sched., Part I., Rule* 6.

By the Finance (No. 2) Act, 1915, Fourth Schedule, Part I., rule 6, "where any company, either in its own name or that of a nominee, owns the whole of the ordinary capital of any other company carrying on the same trade or business or so much of that capital as under the general law a single shareholder can legally own, the provisions of Part III. of this Act as to excess profits duty and the pre-war standard of profits shall apply as if that other company were a branch of the first-named company, and the profits of the two companies shall not be separately assessed."

The appellant company, which manufactured rubber tyres and other goods, and which required for that purpose large quantities of raw rubber which they did not produce, in order to ensure a supply of raw rubber acquired the whole of the shares in five companies which owned rubber estates and which did nothing except cultivate rubber trees and tap them and ship the raw rubber produced therefrom to England. The produce of those five companies was not available for anyone other than the appellant company:—

Held, that the appellant company did not carry on the same trade or business as the other five companies carried on, and that therefore rule 6 of the Fourth Schedule, Part I., of the Finance (No. 2) Act, 1915, did not apply, and the trade or business of each of the five companies could not be treated, for the purposes of the excess profits duty, as a branch of the appellant company's trade or business.

CASE stated under s. 45, sub-s. 5, of the Finance (No. 2) Act, 1915, and s. 59 of the Taxes Management Act, 1880, by

the Commissioners for the Special Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners held on December 20, 1917, for the purpose of hearing appeals, the Dunlop Rubber Co. appealed against two assessments to excess profits duty aggregating 35,789*l.* 9*s.* 6*d.* (less a deduction of 1789*l* 9*s.* 6*d.* under s. 35 of the Finance (No. 2) Act, 1915), for the accounting period of twelve months ended August 31, 1914, made upon them by the Commissioners of Inland Revenue, under the provisions of the Finance (No. 2) Act, 1915, Part III.

2. The Dunlop Rubber Co. (hereinafter called the appellant company) was originally incorporated as "Byrne Brothers India Rubber Co., Ld.," under the Companies Acts, 1862 to 1893, on November 12, 1896, the change of name being decided upon at extraordinary general meetings held on October 24, 1900, and November 14, 1900, and registered November 26, 1900. The original capital of the company was 20,000*l.* in 1*l.* shares. At present the total share capital issued amounted to 3,000,000*l.* The objects for which the company was established were stated in the Memorandum of Association, para. 3, (*a*), (*b*) and (*c*), as follows :—

"(*a*) To acquire the business of manufacturers of india rubber goods, heretofore carried on at The Manor Works, Lichfield Road, Aston, Birmingham, by Thomas Charles Byrne, Edmund Joseph Byrne, and James Frederick Byrne, under the style or firm of The Byrne Brothers India Rubber Co., and to carry on all or any of the following businesses, namely, manufacturers of articles in india rubber or other like gums, or the same in combination with any metallic or non-metallic substance, dealers, agents, factors and merchants in the same manufactures ; and to sell, manufacture and deal in commodities of all kinds which can be conveniently dealt in or manufactured by the company in connection with any of its objects, and to carry on any other business whether manufacturing or otherwise which can be conveniently carried on in connection with any of the company's objects."

"(*b*) To carry on the trade or business of general india

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rubber, gutta percha, asbestos, waterproofing, textile, leather and canvas manufacturers, or the combination of the same and of articles to be manufactured from such commodities, and to factor, sell or otherwise deal with the same."

"(c) To buy and sell raw rubber as factors, merchants, or otherwise, either on account of the company or any other company person or firm."

3. During the period covered by the assessment under appeal, i.e., from September 1, 1913, to August 31, 1914, the appellant company owned the whole of the shares in the following five companies (hereinafter referred to as "the five companies") all of which were registered as private companies with limited liability under the Companies (Consolidation) Act, 1908.

Name of Company.	Date of Incorporation.	Nominal Capital in 1*l.* Shares.
Bemban Rubber Estate, Ld.	May 17, 1911	5,000*l.*
Bibile Rubber Co., Ld.	June 9, 1911	75,000*l.*
Gemas Rubber Co., Ld.	March 5, 1910	120,000*l.*
Gomali Rubber Co., Ld.	January 21, 1910	120,000*l.*
Vigornia Rubber Co., Ld.	January 27, 1910	20,000*l.*

The objects for which each of the five companies was formed were stated in the Memorandum of Association as having been to acquire, take over, work and develop rubber estates, to carry on the business of planters, cultivators, sellers and dealers in rubber, tea, coffee, gutta-percha and gums of every description, and to manufacture, dispose of, sell and deal in products of coffee, tea, rubber, gutta-percha and gums of every description. In each instance wide subsidiary powers were taken. In the case of the Bemban Rubber Estate, Ld., para. 3 (*a*) of the Memorandum of Association was as follows:—"To carry on in Great Britain and elsewhere all or any of the trades or businesses of—(1.) Rubber estate owners, planters, growers and dealers in all kinds of rubber and gutta-percha and gums of every description, corn, tea, coffee, rice, tobacco, oil, cocoanuts, pines, sugar, spices, cinchona, opium, wines, padi, cereals, cotton, flax, cocoa-nut fibre, and other vegetable or agricultural products in the Settlement of Malacca and in any other part of the world: (2.) Manufacturers, factors and

dealers of and in india-rubber, gutta-percha, webbing, canvas and any substitute for the same respectively, or any elastic or like substances or material, and all kinds of articles, materials and appliances manufactured in whole or in part of india-rubber or gutta-percha or other elastic substances or materials : (3.) Manufacturers, factors, and dealers of and in motor cars, cycles, carriages, and other vehicles, and all necessary parts thereof : (4.) The general businesses of engineers, machinists, millwrights, wheelwrights, brassfounders, coppersmiths, iron-founders, wire drawers, tube makers, saddlers, galvanizers, japanners, enamellers, electroplaters, furriers, timber merchants, printers and packing-case makers ; (5.) Manufacturers, factors and dealers of and in machines, plant, utensils, and apparatus for the above trades or any of them : (6.) Any other business incidental to or arising out of or which can conveniently be carried on in conjunction with such businesses or any of them."

The registered office of each of the five companies was in the United Kingdom at 14, Regent Street, London, S.W. In the London Directory the entry for this address did not mention any of the five companies but gave only the name of the appellant company and that of the " Parent Tyre Co., Ld." The registered office of the appellant company was at 150–2, Clerkenwell Road, London, E.C., but it had offices and showrooms at 14, Regent Street.

4. The following facts were admitted or proved to the satisfaction of the Commissioners at the hearing of the appeal :—

(*a*) In order to carry on their business the appellant company required very large quantities of raw rubber, which they used in conjunction with other substances and ingredients for the purpose of manufacturing pneumatic and solid rubber tyres and other goods partly compounded of rubber. In all cases the raw rubber was mixed and treated by the appellant company with sulphur and other chemical substances and subjected by the appellant company to various manufacturing processes in order to produce the finished articles sold by the appellant company.

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(*b*) The sole object the appellant company had in view when they acquired the whole of the shares in the aforesaid five companies was to ensure a supply of raw rubber to be used by them in their said business.

(*c*) The appellant company were the promoters of three of the five companies, videlicet, The Bibile Rubber Co., Ld., The Gemas Rubber Co., Ld., and The Gomali Rubber Co., Ld., and acquired the shares and rights of the shareholders in the Bemban Rubber Estate, Ld., and the Vigornia Rubber Co., Ld., at a cost of 20,000*l.* and 45,000*l.* respectively.

(*d*) None of the five companies had in fact done anything except cultivate rubber trees, tap them, coagulate the gum obtained by tapping, and ship the raw product to England. The appellant company themselves had in fact done nothing in the way of cultivating rubber trees, tapping them, coagulating the gum obtained by tapping, or shipping the raw product to England.

(*e*) During the 12 months ended August 31, 1914, the whole of the produce of the estates owned and worked by the five companies was taken by the appellant company at the market price of the day on which the shipping documents reached the London offices of the vendor companies. The said produce was not, nor was any part thereof, available for any one other than the appellant company. The total quantity of rubber produced by the five companies did not amount to nearly one-half of the total amount used by the appellant company in their business.

(*f*) The appellant company through directors appointed by themselves as owners of all the shares were able to control, and did by virtue of such shareholdings from September 1, 1913, to August 31, 1914, control the operations of the five companies.

No agreement had been entered into between the appellant company and the five companies or any of them.

Of the directors of the five companies two were not connected with the appellant company. Of these one was resident director at Malacca. He received his instructions from boards of directors sitting in London, the members of which with one exception were connected with the appellant company.

The appellant company found the money necessary to develop the several estates belonging to the five companies up to the time when the trees began to yield rubber. None of the five companies had ever declared a dividend.

5. No question of figures arose in connection with this appeal. The sole point of law as to which the opinion of the High Court was sought was as to the meaning of the Fourth Schedule, Part I., rule 6, of the Finance (No. 2) Act, 1915, which enacts

"Where any company, either in its own name or that of a nominee, owns the whole of the ordinary capital of any other company carrying on the same trade or business or so much of that capital as under the general law a single shareholder can legally own, the provisions of Part III. of this Act as to excess profits duty and the pre-war standard of profits shall apply as if that other company were a branch of the first-named company, and the profits of the two companies shall not be separately assessed."

6. In making the assessment specified in para. 1 of the case the Commissioners of Inland Revenue proceeded on the assumption that the appellant company were within the terms of rule 6, and that under that rule the trade or business of each of the five companies was, for the purposes of the excess profits duty, to be treated as a branch of the appellant company's trade or business.

At the hearing of the appeal the appellant company contended that rule 6 did not apply to them for the reason that they did not carry on the same trade or business as that carried on by the five companies, and that the computation of their liability (if any) to the excess profits duty should be made exclusive of the results disclosed by the accounts of the five companies.

This contention was resisted on behalf of the Commissioners of Inland Revenue.

7. The Commissioners for the Special Purposes of the Income Tax Acts found that the operations of the five companies together with the operations of the Dunlop Rubber Co., Ld., constituted in fact one and the same trade

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or business. They accordingly held that the contention of the appellant company was not maintainable and determined the appeal in favour of the Commissioners of Inland Revenue on the point of law involved, but as it was agreed between the parties that the liability of the appellant company—pursuant to such determination—was 30,000*l.* (less 1500*l.* 6*s.* deductable under s. 35 of the Finance (No. 2) Act, 1915), they reduced the assessments accordingly.

Sir John Simon K.C., *Gore-Browne K.C.* and *Bremner* for the appellant company. The decision of the Commissioners for the Special Purposes of the Income Tax Acts was wrong. Rule 6 of the Fourth Schedule, Part I., of the Finance (No. 2) Act, 1915, has no application to the present cases, because the five companies which grow the rubber do not carry on the same trade or business as that carried on by the appellant company which manufactures and sells rubber tyres and other goods. The finding of fact in para. 4 (*d*) is conclusive in favour of the appellants.

Sir Ernest Pollock S.-G. and *Parr* for the Commissioners. If the rule is read as Sir John Simon reads it, there is no case to which it could apply because no company can carry on identically the same business as that which another company carries on. The words "carrying on the same trade or business" in rule 6 cannot therefore be construed literally, some meaning must however be given to them. They mean carrying on a business of a similar or like character. The question is not whether the appellants are in a metaphysical sense carrying on the same business as that which five companies carry on, but whether the Commissioners were entitled to find that they are carrying on a like trade or business. The subsidiary companies only grew the rubber for the appellant company. It was essential that the appellant company as manufacturers of rubber goods should have a supply of raw rubber. They secured a source of supply which should be available for them and not for anybody else by means of subsidiary companies in which they held all the capital and nominated the directors. It

may therefore be considered that the business which the five companies carried on was a like business to that which the appellant company carried on, or that it was a branch of the appellant company's business, inasmuch as the whole of their output was taken by the appellant company.

ROWLATT J. When this case was opened by Sir John Simon the point seemed to me so clear that when I called upon the Solicitor-General I thought I must have overlooked some elementary point. After hearing the Solicitor-General's argument I still think the case is a perfectly clear one.

The appellant company is the well-known Dunlop Rubber Co. which carries on the business in this country of manufacturing rubber tyres and other goods. That company owns the whole of the ordinary capital of five other companies which own rubber estates in the Far East and cultivate rubber trees and obtain raw rubber from the trees by tapping. The appellant company does nothing in the way of cultivating rubber trees nor of obtaining the raw rubber from the trees, nor do the five companies do anything in the way of manufacturing rubber goods from the raw material.

In those circumstances the question arises whether the appellant company owns, within the meaning of rule 6 of Schedule 4, Part I., of the Finance (No. 2) Act, 1915, the whole of the ordinary capital of any other company carrying on the same trade or business.

The Solicitor-General has quite properly pointed out that no two companies or two individuals can carry on the same trade or business in the sense that a trade or business is an individual thing which, if one man owns it, another man does not. The rule, however, cannot mean that. The words "carrying on the same trade or business" are very familiar in the commercial and financial language of the day and clearly to my mind describe an individual or company that is in the same line of business as another individual or company carrying on the same kind of business. If they are both bankers or milliners they are carrying on the same business. If one company owns all the capital of the other company

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carrying on the same trade or business in that sense then under this rule the latter company, even though it may be carrying on business in a different part of the country, is treated as a branch of the company which owns the whole of its capital. The Commissioners have apparently construed the words of the rule as if they were: "Where a company owns the whole of the ordinary capital of any other company carrying on a different part of what is essentially one business." I however cannot get that meaning out of the language used in the rule. The appeal must therefore be allowed.

Appeal allowed.

Solicitors for appellant company: *John B. & F. Purchase.*
Solicitor for Commissioners: *Solicitor of Inland Revenue.*

R. F. S.

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